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Supreme Court, U.S.
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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

FRED H. VAHLSING, JR.,
PETITIONER,

v.

THE STATE OF MAINE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

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Questions Presented.

I. Can a perjury conviction be upheld consistent with the Due Process Clause where the alleged false statement was made at a void administrative hearing and was immaterial to any valid administrative inquiry?

II. Does an administrative proceeding which seeks to enforce ex post facto a statutory scheme concerning hazardous substances possess the legitimacy necessary to support a perjury prosecution for an alleged false statement made there?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE.

The petitioner, Fred H. Vahlsing, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court which were entered on April 10, 1989, and April 11, 1989, respectively, which judgment became final upon the denial of the petitioner's motion for reconsideration on May 1, 1989.

Opinions Below.

The opinion of the Maine Supreme Judicial Court, as yet unreported, appears in the appendix hereto (A. 1a-9a). The

order of the Maine Supreme Judicial Court denying the petitioner's motion for reconsideration appears in the appendix hereto (A. 11a). The unreported administrative order of the Maine Department of Environmental Protection entitled Designation of Uncontrolled Hazardous Substance Site and Administrative Order, dated August 27, 1984, appears in the appendix hereto (A. 29a-34a). The unreported administrative order of the Maine Board of Environmental Protection entitled Appeal of Designation of Uncontrolled Hazardous Substance Site and Order, dated December 19, 1984, appears in the appendix hereto (A. 34a-38a). The unreported decisions of the Maine Superior Court, Silsby, J., dated May 2, 1986, and June 4, 1986, respectively, appear in the appendix hereto (A. 41a-44a).

Jurisdiction.

The judgment of the Maine Supreme Judicial Court affirming the petitioner's conviction of perjury was entered on April 10, 1989, with the written opinion supporting said judgment being entered one day later. The petitioner filed a timely motion for reconsideration with the Maine Supreme Judicial Court which motion was denied on May 1, 1989. The jurisdiction of this Court to review the judgment of the Maine Supreme Judicial Court is invoked under 28 U.S.C. § 1257(a).

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendment XIV, § 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

> of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Article I, Section 10, clause 1:

> "No state shall . . . pass any . . . ex post facto law . . . ."

The full text of 17-A M.R.S.A. § 451 (Perjury) under which the petitioner was convicted is set forth in the appendix hereto (A. 49a-50a). The relevant portions of 38 M.R.S.A. §§ 1361-1371 (Uncontrolled Hazardous Substance Sites) under which the administrative proceedings took place, is reproduced in the appendix hereto (A. 51a-55a).

Statement of the Case.

Petitioner Fred H. Vahlsing, Jr. ("Vahlsing") was at all relevant times the president of Vahlsing, Inc. ("the corporation"), an entity organized and existing under the laws of the State of Delaware. Duly licensed to do business in the State of Maine, the corporation began in about 1961 the manufacture and sale of frozen french-fry potatoes primarily to the fast food industry at its potato processing complex in Easton, Maine. The complex itself was located on about sixty-five (65) acres of land which the corporation leased from the Easton Development Corporation; the corporation's processing facility also made use of some contiguous acreage which it leased from the Bangor and Aroostook Railroad Company. This entire area, i.e., the sixty-five (65) acres together with the contiguous

acreage, was enclosed by the corporation with a steel cyclone fence except for the northerly border which was bounded by Bangor and Aroostook railroad track. In August of 1971, chemicals used in connection with agriculture and the cleaning of machinery of a nearby sugar mill were transferred to the corporation's potato processing complex and stored in a then empty green-sided, black-roofed building used by the corporation for the storage of potatoes from September through May ("the potato house"). This structure was built by the corporation in 1968 and was located entirely within the complex's steel cyclone fence on the contiguous parcel of land owned by the Bangor and Aroostook Railroad Company and leased to the corporation. The potato house itself was therefore the corporation's personal property erected in 1968 as a necessary adjunct to its potato processing facility.

On July 13, 1973, all of the chemicals being stored in the potato house were conveyed to the State of Maine (via the Maine Industrial Building Authority) by the corporation. Specifically, the corporation conveyed to MIBA ". . . any machinery, equipment, spare parts, tools or other personal property presently located on the real estate of Easton and Vahlsing which can *only* be used on or in conjunction with sugar plant machinery or in connection with the operation of a sugar plant" (A. 14a) (Emphasis in original). Despite having assumed ownership of these chemicals in 1973, the State of Maine did not remove them from the potato house and they remained there.

In July of 1974, the corporation filed for protection as a debtor under Chapter 11 of the Bankruptcy Act in the United States District Court for the Southern District of Texas (Brownsville Division); thereafter it operated its Easton potato processing complex as a debtor-in-possession. On August 31, 1976, an order issued from the bankruptcy court authorizing the corporation to sell to McCain Foods, Inc. not only its leasehold interest in the potato processing complex located on the

sixty-five (65) acres of land owned by Easton Development Corporation but also

> [a]ll [of its] utilities, utility agreements, easements, *rights*, and rights of way *connected, or useful to the operation of the potato processing facility or land contiguous to the potato processing facility*.

(A. 19a-20a) (Emphasis supplied). Pursuant to this order by the bankruptcy court, the corporation on September 1, 1976, issued a Bill of Sale to McCain Foods, Inc. which described the goods and chattels transferred thusly:

> *All* furniture, *fixtures, equipment*, turbine systems, machinery, tools, vehicles, *and other personal property belonging to Vahlsing, Inc.*, located on the property of Easton Development Corporation in Easton, Maine, *and used now or formerly in connection with the Potato Processing Plant business now or formerly operated by Vahlsing, Inc. in Easton, Maine*, including but not limited to the items listed in Schedule A . . . .

(A. 25a) (Emphasis supplied).

At some time subsequent to its purchase of all of the corporation's property used in conjunction with the potato processing business, McCain enclosed the complex's northerly boundary with fencing so that the entire facility, including the contiguous acreage owned by the Bangor and Aroostook Railroad Company and containing the potato house, was now bounded by fencing. On August 3, 1979, the corporation was granted a discharge from bankruptcy by the bankruptcy court (A. 27a-28a). After the corporation obtained the discharge, there was no lease ever executed between the corporation and the Bangor and Aroostook Railroad Company.

On August 27, 1984, the Commissioner of Maine's Department of Environmental Protection issued an order designating the potato house as well as the land underneath it as an uncontrolled hazardous substance site pursuant to 38 M.R.S.A. § 1365 (A. 29a-34a). Treating Vahlsing and the corporation as one and the same entity, it found, among other things, that "Vahlsing" is and was the owner of the potato house "during which time that chemicals, including hazardous substances, were brought to and placed in the building" (A. 29a-30a). It was further found that "Vahlsing" has leased the land upon which the potato house is located from the Bangor and Aroostook Railroad Company even though no rent had been paid for the years 1978-1983 and no new lease had ever been executed (A. 30a). Finding that some of the various chemicals stored there since 1971 were hazardous substances within the meaning of 38 M.R.S.A. § 1362(1), the Commissioner concluded that "Vahlsing" and the Bangor and Aroostook Railroad Company were responsible parties as defined by that same section (A. 30a-33a, 51a-52a).[1] "Vahlsing" was therefore ordered to prepare a plan within five days, to remove "all hazardous wastes, contaminated soil and water from the site" (A. 33a-34a).

The corporation (but *not* Vahlsing) appealed this administrative order to the Maine Board of Environmental Protection (BEP)

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[1] 38 M.R.S.A. § 1362(2), provides:

> **Responsible party.** "Responsible party" means any one or more of the following persons:
>
> **A.** The owner or operator of the uncontrolled site;
>
> **B.** Any person who owned or operated the uncontrolled site from the time any hazardous substance arrived there;
>
> **C.** Any person who arranged for the transport or handling of a hazardous substance, provided that the substance arrived at the uncontrolled site; and
>
> **D.** Any person who accepted a hazardous substance for transport, provided that the substance arrived at the uncontrolled site.

(A. 35a-38a). On December 19, 1984, a hearing was held with Vahlsing himself representing the corporation in support of its argument that it should not be a responsible party within 38 M.R.S.A. § 1362(2). On the same day as the hearing, the BEP found and concluded in a written order that the corporation was a responsible party and it accordingly affirmed the Commissioner's earlier designation while continuing his prior order which had operated against *both* Vahlsing and the corporation (A. 38a).

In the wake of the refusal by Vahlsing and the corporation to assume financial responsibility for the clean-up costs associated with these chemicals stored in the potato house since 1971, an indictment issued on March 5, 1985, against Vahlsing for perjury in violation of 17-A M.R.S.A. § 451 (A. 39a-40a, 49a-50a). The basis of the change was three allegedly false statements made by Vahlsing while representing the corporation at the BEP hearing on December 19, 1984 (A. 39a). For the purposes of this petition, only the third alleged false statement is relevant.[2] According to the indictment, this was a statement made by Vahlsing before the BEP that the potato house "had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976" (A. 39a). Moreover, the indictment charged that this alleged false statement was material because

> if believed by [BEP], the Board would have been likely to find that, contrary to the Commissioner's conclusion and finding on page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) . . . .

(A. 39a-40a).

[2] During the perjury trial in the Maine Superior Court, the trial judge (Smith, J.) dismissed the charges relating to the first two alleged false statements because of insufficient evidence.

In the meantime, both Vahlsing and the corporation appealed BEP's ruling to the Maine Superior Court in accordance with the Maine Administrative Procedure Act and 38 M.R.S.A. § 1365(4). On May 2, 1986, Silsby, J., found that even though Vahlsing was a named party to the administrative proceedings and was subject to the same orders concerning the clean-up of the hazardous substances as the corporation, he was never served with the Commissioner's administrative order as required by 38 M.R.S.A. § 1365(3) (A. 41a-42a). In view of the fact that Vahlsing's appearance before the BEP was confined to his status as president of the corporation and not individually, Judge Silsby ruled that this failure by BEP to effect proper service upon Vahlsing warranted the reversal of the Commissioner's decision against him and the sustaining of his appeal (A. 42a). One month later, the same Maine Superior Court judge sustained the corporation's appeal from the BEP's decision (A. 43a-44a). He determined that while there may have been sufficient evidence to support the BEP decision, it had improperly placed the burden of proof upon the corporation to show that it was not a responsible party within 38 M.R.S.A. § 1362(2) (A. 43a-44a). As the Superior Court judged observed, "[the] burden of proof is of fundamental importance and unless the legislature has otherwise provided the party or agency making an assertion has the burden of proving it" (A. 43a).[3] Judge Silsby accordingly vacated the

[3] In fact, 38 M.R.S.A. § 1365(4), provides in pertinent part:

> . . . The nature of the hearing before the [BEP] shall be an appeal. At the hearing all witnesses shall be sworn and the department [of environmental protection] shall *first* establish the basis for the order and for naming the person to whom the order was directed. The burden of going forward shall *then* shift to the person appealing to demonstrate, based upon the preponderance of the evidence, that the order should be modified or rescinded. . . .

(Emphasis supplied).

BEP's decision against the corporation and remanded the entire administrative matter to the BEP for a new hearing in accordance with his order (A. 44a). A new hearing was never held by BEP and consequently there has never been an enforceable administrative finding affixing responsibility to the corporation or Vahlsing for the hazardous substances found in the potato house.

Despite these rulings which invalidated the administrative proceedings against Vahlsing and the corporation, the perjury trial of Vahlsing for the alleged false statements he made before the BEP commenced in the Maine Superior Court on September 2, 1986, before Smith, J., and a jury. During and after the presentation of the evidence, Vahlsing sought acquittal on the one remaining alleged false statement in the indictment[4] by contending *inter alia* that the statement was not material to any valid inquiry by the BEP since Judge Silsby had ruled that neither Vahlsing nor the corporation had been properly determined to be responsible parties under 38 M.R.S.A. §§ 1361 *et seq.* (A. 56a-58a). In addition, Vahlsing claimed that his statement about the corporation's sale of the potato house to McCain Foods, Inc. in 1976 could not possibly have been material to the BEP's inquiry because if, as the prosecution had asserted, there were no *ex post facto* problems with Maine's Uncontrolled Hazardous Substance Site Law, it could not have mattered what occurred in 1976 since the corporation had already owned the potato house *for fifteen years prior to 1976* and was therefore a responsible party under 38 M.R.S.A. § 1362(2) in any event (A. 58a-60a). Finally, Vahlsing argued that as a matter of law his alleged false statement concerning the sale of the potato house in 1976 to McCain Foods, Inc. was immaterial since the corporation became relieved of any responsibility for these hazardous substances or the expenses

[4] See note 2, *supra*.

associated with their clean-up upon its discharge from bankruptcy in 1979 (A. 61a-66a). That is, regardless of the corporations' sale of the potato house to McCain Foods, Inc. in 1976, its discharge from bankruptcy in 1979 relieved the corporation from any financial obligations arising under Maine's environmental laws (A. 61a-66a). For all of these reasons, Vahlsing claimed that the materiality element of the crime of perjury had not been proven beyond a reasonable doubt.

Vahlsing's arguments were rejected by the trial court and on September 30, 1986, the jury found him guilty of perjury (A. 2a). On December 18, 1986, Vahlsing was sentenced to a one year term of imprisonment with all but sixty days thereof suspended (A. 45a-46a). Upon a timely appeal to the Maine Supreme Judicial Court, Vahlsing repeated all of his earlier arguments concerning the prosecutor's failure to prove materiality beyond a reasonable doubt. In affirming the conviction, however, the Supreme Judicial Court responded to these arguments by simply noting that "[o]n appeal there is no longer any issue concerning the materiality of any of the statements, the fact that they were made or that they occurred in a judicial proceeding" (A. 3a). Vahlsing's subsequent timely motion for reconsideration raised once again all of these arguments surrounding the materiality of his alleged false statement before the BEP and the necessity for proof beyond a reasonable doubt on the issue. Moreover, the motion made explicit that these arguments implicated the federal constitutional right to a fair and impartial trial. Vahlsing's motion for reconsideration was eventually denied on May 1, 1989 (A. 11a). Execution of the sentence has been stayed pending the disposition of this petition for certiorari by Vahlsing (A. 47a-48a).

How the Federal Question Was Raised.

Vahlsing raised the federal constitutional issues of proof beyond a reasonable doubt, due process, a fair and impartial trial, and the *ex post facto* effect of Maine's Uncontrolled Hazardous Substance Site Law at trial in various motions to dismiss or for acquittal and on appeal in his reply brief as well as in his motion for reconsideration.

Reasons for Granting the Writ.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH ESTABLISH THAT AS A MATTER OF DUE PROCESS THE MATERIALITY ELEMENT OF THE CRIME OF PERJURY MUST BE PROVEN BEYOND A REASONABLE DOUBT.

Vahlsing was charged by the State of Maine in its indictment with making a false material statement before the BEP on December 19, 1984, concerning the corporation's sale of the potato house to McCain Foods, Inc. in 1976 (A. 39a). According to the indictment, Vahlsing's allegedly false statement was material because

> if believed by the [BEP], [it] would have been likely to find that, contrary to the Commissioner's conclusion and finding on page 3 of the Order, [the corporation] was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1)(A) (1983).

(A. 39a-40a). Maine's perjury statute under which Vahlsing was prosecuted defines the materiality element to mean "capable of affecting the course or outcome of the proceeding" (A. 50a). Under Maine law, then, the statement must be proven to be not only false but also capable of affecting the course or outcome of the proceeding. If such materiality is lacking in the evidence, the crime of perjury could not have been committed. *State* v. *Lunney*, 400 A.2d 759, 763-764 (Me. 1979).

Like every element of a crime, the State was constitutionally required to prove the materiality of Vahlsing's alleged false statement beyond a reasonable doubt and its failure to do so would be a violation of the Due Process Clause of the Fourteenth Amendment. *Patterson* v. *New York*, 432 U.S. 197, 204-205, 209 (1977). *Mullaney* v. *Wilbur*, 421 U.S. 684, 703-704 (1975). *In re Winship*, 397 U.S. 358, 362-364 (1970). Vahlsing submits that the State's proof failed to show the materiality of his statement because it was made during a void administrative hearing and was not germane to any valid determination by the BEP as to whether the corporation was a responsible party within Section 1362(2) of the Uncontrolled Hazardous Substance Site Law. The affirmance of his perjury conviction by the Maine Supreme Judicial Court was therefore not only error of law but also a denial of his federal constitutional rights.

A. *The Void Administrative Proceedings.*

In two separate orders entered after Vahlsing's indictment for perjury but before a trial on the charge, Judge Silsby of the Superior Court first determined that the BEP hearing was a nullity as to Vahlsing since he had not been served with the

Commissioner's administrative order as required by 38 M.R.S.A. § 1365(3) (A. 41a-42a); and he then vacated the BEP's decision against the corporation as well because the burden of proof had been improperly placed upon it to show that it was not a responsible party under 38 M.R.S.A § 1362(2) (A. 43a-44a). A new hearing before the BEP was recommended but never undertaken (A. 44a). Nor did the BEP ever appeal this ruling to any higher State court.

Because the BEP's decision was vacated on such a fundamentally important irregularity, Vahlsing submits that the entire proceeding before the BEP on December 19, 1984, was void *ab initio* as to the corporation and the hearing therefore could not serve as an appropriate forum to support this prosecution against Vahlsing for perjury or be relied upon by the State to establish the materiality element of the offense against him. This Court has held that perjury or false swearing cannot be committed in proceedings which are void for want of jurisdiction and that there must be a competent tribunal before a false statement is shown to be perjurious. *United States* v. *Williams*, 341 U.S. 58, 65 (1951). *Christoffel* v. *United States*, 338 U.S. 84 (1949). Here the failure of the BEP to fix properly the burden of proof upon the parties before it went to the very heart of its factfinding mission and tainted irretrievably any evidence that it heard. As Judge Silsby observed, "[t]he burden of proof is of fundamental importance and unless the legislature has otherwise provided the party or agency making an assertion has the burden of proving it" (A. 43a). In this sense, the BEP lacked the jurisdiction or competence to decide the matter before it not because it lacked adjudicatory power under this particular statutory scheme but because it failed to exercise that power in the proper manner.

This Court has traditionally recognized such lack of jurisdiction in other contexts when fundamental irregularities in the process have fatally contaminated the truth-finding mission of a tribunal. See, e.g., *United States* v. *Wade*, 388 U.S. 218,

240-241 (1967); *Mapp* v. *Ohio*, 367 U.S. 643, 648-649 (1961); *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938). See also *United States* v. *Remington*, 208 F.2d 567, 571-575 (2d Cir. 1953) (Hand L., J., dissenting). Developments in the Law, Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1045-1055, 1209-1216 (1970). Moreover, this Court has consistently upheld the fundamental importance of the proper allocation of the burden of proof in order to insure a fair and impartial hearing consistent with due process. See, e.g., *Mullaney* v. *Wilbur*, 421 U.S. at 699-701; *In Re Winship*, 397 U.S. at 361-364. See also *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 266 (1878). All of these precedents should converge to convince this Court that the BEP's failure to allocate properly the burden of proof of the parties before it on December 19, 1984, renders that proceeding void *ab initio* and therefore it cannot serve as a forum to support this perjury prosecution or be otherwise used by the State to establish the materiality element of the charge against Vahlsing.

B. *The Irrelevancy of Vahlsing's Statement.*

The plain terms of 38 M.R.S.A. § 1362(2) makes any person a "responsible party" if he (or it) is, in relevant part, an (A) owner or operator of the uncontrolled site or (B) a person who owned or operated the uncontrolled site *from the time any hazardous substance arrived there* (A. 52a) (emphasis supplied). The uncontradicted evidence before the BEP showed that in August of 1971, the chemicals were transferred to the corporation's potato house. In July of 1973, the corporation conveyed those chemicals to the State of Maine which then failed to remove them from this location. Measuring this evidence against the definitions of a "responsible party" under

Section 1362(2), it seems clear that the corporation is a "responsible party" within the meaning of that section since it owned the potato house at the time the chemicals arrived there in 1971. In fact, the Commissioner expressly found as a fact that the corporation was a responsible party under subsection (B), *supra*, when he determined that it "was the owner of that building during which time that chemicals, including hazardous substances, were brought to and placed in the [potato house]" (A. 29a-30a).

Accordingly, *the corporation's own evidence* which it adduced before the BEP established that it was a responsible party under subsection (B) of Section 1362(2) because it owned the potato house in 1971 when the chemicals were first transferred there. Vahlsing's subsequent statement during the BEP hearing concerning the corporation's sale of the potato house to McCain Foods, Inc. in 1976 therefore could not have been material, i.e., capable of affecting the course or outcome of the proceeding, to any finding of responsibility as charged in the indictment (A. 39a-40a). That is, no matter what transpired in 1976 between the corporation and McCain Foods, Inc., the corporation still remained a responsible party based upon its ownership of the potato house in 1971. Having thus anchored the corporation's responsibility for these chemicals to its ownership of the building in 1971, the BEP could not have been deflected by any subsequent events and Vahlsing's alleged false statement therefore lacks the requisite materiality to support this conviction. See *United States* v. *Freedman*, 445 F.2d 1220, 1226 (2d Cir. 1971); *United States* v. *Provinzano*, 333 F. Supp. 255, 258-259 (E.D. Wis. 1971); *United States* v. *Icardi*, 140 F. Supp. 383, 389 (U.S.D.C. 1956).

Finally, in view of the corporation's discharge from bankruptcy in 1979, it was relieved of all prior debts including any obligations associated with the chemicals it stored in its potato house from and after 1971. *Ohio* v. *Kovacs*, 469 U.S. 274,

278-279, 282-283 (1985). For this reason also, Vahlsing's alleged false statement before the BEP about the corporation's sale of the potato house to McCain Foods, Inc. in 1976 lacks any materiality as a matter of law in any event. Stated another way, even if believed by the BEP, Vahlsing's statement could not have affected the corporation's status as a responsible party which, because of its 1979 discharge from bankruptcy, was nevertheless relieved of any financial obligation under the Uncontrolled Hazardous Substance Site Act. *Id.*

II. The Decision Below Conflicts with the Decisions of this Court Which Enunciate the Important Constitutional Principle That States May Not Pass or Enforce Ex Post Facto Legislation.

The Uncontrolled Hazardous Substance Site Act, 38 M.R.S.A. §§ 1361 *et seq.*, is a statutory scheme which became effective in 1983 and makes "[a]ny person who owned or operated the uncontrolled site from the time any hazardous substance arrived there" responsible for the costs of clean-up, abatement or mitigation of the threats or hazards posed or potentially posed by the uncontrolled site (A. 51a-55a). As applied to the facts here, the BEP and the State have sought to make this 1983 legislation reach back to 1971 in order to hold the corporation responsible for the chemicals it stored in its potato house since that time until 1973 when it sold those chemicals to the State of Maine or 1976 when it sold the potato house itself to McCain Foods, Inc. Moreover, the State has employed this legislation to place Vahlsing in the untenable position of being subject to a perjury indictment when (on behalf of the corporation) he attempted to explain before the BEP the reasons why the corporation should not be found to be

a responsible party within the meaning of Section 1362(2). In effect and in reality, this 1983 enactment has thus been made to apply to corporate acts beginning in 1971 and continuing to at least 1976; and Vahlsing's perjury prosecution depends directly upon this retroactive reach of the Uncontrolled Hazardous Substance Site Act. Vahlsing submits, however, that such an expansive application of the Act by the State amounts to *ex post facto* legislation which is prohibited by Article I, Section 10, clause 1 of the federal constitution. Accordingly, the BEP hearing seeking to enforce retroactively the reach of 38 M.R.S.A. §§ 1361 *et seq.* was a legal nullity and could not possess the legitimacy necessary to support this perjury prosecution of Vahlsing for the alleged false statement he made there.

An *ex post facto* law is any statute which punishes an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or which deprives one charged with a punishable act any defense available according to the law at the time when the act was committed. *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981). *Bouie* v. *Columbia*, 378 U.S. 347, 352-355 (1964). See *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977). Through this constitutional prohibition, the Framers sought to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. *Weaver* v. *Graham*, 450 U.S. at 28-29. *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977). The ban also restricts "arbitrary" and potentially vindictive legislation. *Id.* In order to make out a violation of the *ex post facto* clause, two elements must be proven: the law "must be retrospective, that is, it must apply to events occurring before its enactment, and [the law] must disadvantage the offender affected by it." *Id.* at 29. See *Crowell* v. *United States Parole Com'n*, 724 F.2d 1406, 1408 (3d Cir. 1984).

Here the terms of the Uncontrolled Hazardous Substance Site Act of 1983 explicitly impose responsibility for acts occurring before its enactment, i.e., "from the time any hazardous substance arrived" at the uncontrolled site (A. 52a). In addition, the Act's terms plainly disadvantage the corporation as well as Vahlsing who were given no fair notice in 1971 that the chemicals stored in the potato house at that time would be characterized twelve years later as a hazardous substance exposing the corporation to substantial financial penalties and ultimately Vahlsing to a perjury prosecution as a result of the Act's enforcement by the BEP. For these reasons, there is a violation of the *ex post facto* clause; the BEP hearing was therefore a legal nullity and could not possess the legitimacy necessary to support this perjury prosecution of Vahlsing for the alleged false statement he made there.

Conclusion.

For all of the these reasons, a writ of certiorari should issue from this Court to review the judgment and opinion of the Maine Supreme Judicial Court.

Respectfully submitted,

DENNIS P. DERRICK,*
41 Porter Street,
Wenham, Massachusetts 01984.
(508) 468-7211

**Counsel of Record*

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Appendix A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 6047
Law Docket No. PEN-86-505

STATE OF MAINE

v.

FRED VAHLSING

Argued November 15, 1988
Decided April 11, 1989

Before ROBERTS, GLASSMAN, CLIFFORD, HORNBY and COLLINS, JJ.

HORNBY, J.

This case requires us to canvass a variety of evidentiary and other issues that arose in the course of a twenty-day perjury trial.

Fred H. Vahlsing, Jr. is the president of Vahlsing, Inc. The Department of Environmental Protection (DEP) charged Vahlsing, Inc. with illegally storing hazardous wastes. At a hearing on the charge, the Board of Environmental Protection (BEP) permitted Vahlsing, Inc. to appear through its president (Vahlsing) rather than legal counsel. As a result, Vahlsing argued legal and evidentiary matters to the Board, examined and cross-examined witnesses and generally performed the same functions as legal counsel. Indeed, he was called "counsel" by the Board chairman. In addition, Vahlsing took an oath and testified as a witness. Although the Board found against Vahlsing, Inc., its decision was subsequently vacated in Superior Court (Aroostooko County; *Silsby, J.*).

As a result of statements he made at the hearing, Vahlsing was later indicted on perjury charges consisting of three specifications. Ultimately only the last specification went to the jury: that Vahlsing made the false statement under oath at the BEP hearing "that the building identified in the (DEP) Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976." In a bill of particulars that accompanied the jury to the jury room along with the BEP hearing transcript, the State specified nine instances of the alleged perjury. Over Vahlsing's objection, the DEP's Order charging the corporation (and Vahlsing personally) with illegally storing the wastes also went to the jury. The jury found Vahlsing guilty of perjury. Vahlsing appeals the Superior Court (Penobscot County: *Smith, J.*) judgment on the jury verdict of guilty. We affirm.

The Perjury Charge

The State charged Vahlsing with perjury for falsely swearing at the BEP hearing "that the building . . . had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976." In a bill of particulars obtained on Vahlsing's motion, the State listed nine occasions when Vahlsing referred to either the sale or McCain's subsequent ownership. Vahlsing argues that his conviction must be vacated because the specified instances cannot, as a matter of law, constitute perjury. Essentially, this is an appeal of the denial of his motion for acquittal, and we must examine the record to determine "whether 'on the evidence as a whole, assessed most favorably to the State, a jury acting rationally could not avoid having a reasonable doubt as to the defendant's guilt.'" *State* v. *Gilbert*, 473 A.2d 1273, 1275 (Me. 1984) quoting *State* v. *Howes*, 423 A.2d 419, 424 (Me. 1981). *See also* M.R.Crim.P. 29(a).

Maine's perjury statue, 17-A M.R.S.A. § 481 (1983), provides:

1. A person is guilty of perjury is he makes:

> A. In any official proceeding, a false material statement under oath or affirmation, . . . and he does not believe the statement to be true.

On appeal there is no longer any issue concerning the materiality of any of the statements, the fact that they were made or that they occurred in an official proceeding. The trial judge correctly instructed the jury that it could convict Vahlsing of perjury only for statements he made under oath. In an oath one swears that the *testimony* one gives is the truth, the whole truth and nothing but the truth. Clearly, testimony does not include argument or examination and cross-examination of witnesses. It is immediately apparent from their contexts that in seven of the nine instances in the bill of particulars, Vahlsing was not testifying when he made the statements in question, but acting in the role of counsel to the corporation.[1] Two of the statements, however, were clearly testimony. In one, Vahlsing stated: "Well, I will testify under oath as I sit here that McCain purchased everything inside of that fence when he purchased the processing plant at Easton, Maine." (The building in question was allegedly inside the fence.) In another, he stated that he was about to testify and was under oath, then said: "Everything inside the fence pursuant to United States Bankruptcy Judge John R. Blint's Order was included in the sale to McCain signed by court order on September 1st, 1976.

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[1] The Board's own lawyer responded to one of Vahlsing's assuredly perjurious statements by commenting that there was a "much more direct way" to get that information "[a]nd that would be to state what you [Vahlsing] just said on direct examination . . . . You can say that directly without having to try to elicit that on cross-examination for a long period of time —." This statement by the Board's lawyer was a direct recognition that Vahlsing was not then testifying.

McCain has taken possession of this property." As testimony, either of these statements could support the perjury conviction.

All nine statements, testimonial and nontestimonial, went to the jury in the bill of particulars because Vahlsing introduced the bill of particulars into evidence. So far as any evidentiary error is asserted in admitting the seven nontestimonial statements, we look, therefore, only for obvious error, *see* M.R. Evid. 103(d), and we find none. Since each of the nine statements asserted either that Vahlsing, Inc. sold the building to McCain or that McCain subsequently owned the building (and there is no suggestion that anyone else sold the building to McCain), it is impossible to conceive how a jury could find that one of the statements was knowingly false without reaching the same conclusion for the two testimonial statements. Indeed, Vahlsing's closing argument to the jury did not even attempt to distinguish testimony from other kinds of statements.

With respect to Vahlsing's remaining arguments on the substance of the perjury charge, the transcript of the hearing reveals that Vahlsing recognized that he had taken an oath; the record does not reveal any retraction; the court's instructions adequately covered Vahlsing's statements regardless of whether they are considered fact or opinion, *see Shorette* v. *State*, 402 A.2d 450, 454 (Me. 1979) (false statement of opinion or belief may constitute perjury); there was evidence to support beyond a reasonable doubt the jury's conclusion that the assertions were false and that Vahlsing did not believe them to be true; no instruction concerning conscious awareness of perjury penalties was required; and the other arguments do not require discussion.

Admissability of Administrative Order

The State introduced into evidence the DEP Order that occasioned the administrative hearing. This was an official, four-

page document bearing the emblem of the State of Maine Department of Environmental Protection. It was signed by the Commissioner of the Department. A segment captioned "Findings of Fact" stated explicitly that Vahlsing, Inc. was the owner of the building in question and included information in support of that conclusion. Vahlsing's initial objection that the Order was a nullity was properly overruled. He then objected to the relevance of certain portions of the Order if it was offered for its truth. The trial court indicated that the irrelevant portions could be kept from the jury's consideration through some device such as editing the document before the jury saw it. The State then asked its witness, the former Commissioner of the DEP, to read from the Order. Vahlsing immediately objected on grounds of hearsay, requesting a limiting instruction or a statement by counsel that the contents of the document were not being offered for their truth. Outside the jury's presence, the State conceded that the testimony was not being offered for the truth of the assertions in the document, but "solely for the purpose of establishing what the order says, which was what the hearing was on." This concession should have prompted a limiting instruction under M.R.Evid. 105.[2] Vahlsing was told, however, that his remedy was to pursue the matter on cross-examination. We received neither a limiting instruction to the jury from the court nor a statement from opposing counsel in the jury's presence concerning the limited purpose of the testimony. The witness was permitted to read from the Order that Vahlsing, Inc. was the owner of the building in question, and ultimately the document went to the jury.

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[2] M.R. Evid. 105 provides:

> When evidence which is admissible . . . for one purpose but not admissible . . for another purpose is admitted, the court upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Admission of this evidence without the requested limiting instruction was clearly error. As to the proposition that Vahlsing, Inc. (rather than McCain) owned the building, the document and the testimony were concededly inadmissable hearsay. M. R. Evid. 801(c). *See also* M.R. Evid. 803 (8) (B) (iv). The witness admitted that he had no personal knowledge of the matters in the document. At the very least, Vahlsing was entitled under M.R. Evid. 105 to an instruction that the jury should not consider the document (or the reading of it by the witness) for the truth of the propositions it contained.

We conclude, nevertheless, that admission of the document and the testimony without the limiting instruction was harmless error because of the overwhelming evidence of Vahlsing, Inc.'s ownership of the building in question. The lawyer that represented McCain at the time of its purchase of assets from Vahlsing, Inc. in 1976 testified that the transaction reflected in the purchase documents did not include this building. The Easton Town Manager testified that he visited the building in 1983 with McCain personnel and that McCain personnel denied that McCain owned the building. He testified that in 1983 he also visited the building with Vahlsing and that during the visit Vahlsing never denied his company's ownership of the building; said that he could get rid of the chemical materials in it; offered to give the building to the Town; and referred to salvaging the rafters in the building. The Town Manager testified that in ongoing contacts with Vahlsing he never denied his company's ownership of the building. The evidence showed that generally, Vahlsing took pains to avoid inappropriate taxation, yet never did he challenge the Town's ongoing taxation of this building. Instead, he paid back taxes on behalf of Vahlsing, Inc. to remove a tax lien on this and other locations. When Vahlsing was asked on the stand why he did not deny Vahlsing, Inc.'s ownership of the building to the Town Manager, he had no adequate explanation except to say that "gener-

ally I don't, as I conduct myself, attempt to inform someone else about someone — for instance, Mr. Beaton, about someone else's property. I just don't do that." Moreover, evidence was introduced that subsequent to the alleged sale to McCain, Vahlsing, Inc. paid rent to the Bangor and Aroostook Railroad for the underlying land on which the building was situated. Specifically, in a sale of railroad ties and other materials to the Bangor and Aroostook Railroad from Vahlsing, Inc., Vahlsing permitted an amount to be deducted for back rent.

As contrary evidence Vahlsing argued that the transaction with McCain had involved the entire potato processing complex and that this building was a potato hut, part of that complex, and therefore included within the sale. His explanation of items like the tax payments and lease payments appears primarily to have been that his attention was not directed to this particular building, a very small item in the overall scope of his business affairs. In addition, he presented the testimony of a farmer, corroborated by another witness, that he had been able to obtain, from McCain personnel and with the assistance of McCain personnel, chemicals stored in the building. There was testimony, however, that the person who authorized the acquisition of these chemicals, although the head of the potato procurement office at McCain, had also been general manager of the Vahlsing, Inc. operation and the farmer testified that he did not know what entity this individual was representing in giving him the chemicals.

In other words, the evidence of Vahlsing, Inc.'s ownership of the building is overwhelming. It is true that we have stated that written evidence is more significant to a jury than oral testimony and therefore less likely to be considered harmless error. *See Morgan* v. *Maine*, 312 A.2d 178, 185-186 (Me. 1973). In light of the particular strength of the evidence that Vahlsing, Inc. had not sold the building to McCain in 1976, however, we are confident that this case meets the test of harm-

less error, namely, that it is "highly probable that the error [in admitting the document] did not affect the judgment." *State* v. *Huff*, 469 A.2d 1251, 1253-54 (Me. 1984).[3]

Miscellaneous Matters

The trial court refused to permit Vahlsing to call a new witness after resting his case because no new issue had been raised by the State's rebuttal testimony, the probative value of the proposed evidence was minimal and there was "so little apparent reason" for the late offer. We find no abuse of discrimination. *See* M.R. Crim. P. 26(c).

There was no error in the denial of the mistrial motions and in the court's refusal to give a limiting instruction with respect to evidence admitted on the first two perjury specifications. (The court granted the defendant's motion for acquittal on these specifications before submitting the case to the jury.) Much of the evidence from this very lengthy trial related to more than one specification, and the defendant was able to argue weight of the evidence to the jury. Moreover, the court

[3]The document also contains references to hazardous substances on the premises, references that could be considered prejudicial. When the Order was first admitted, the presiding justice made clear that such objectionable material could be kept from the jury's consideration in some fashion, such as by blocking it out. He informed the parties that they could take care of that matter before the document went to the jury. The State did not ask the DEP Commissioner to read those portions of the Order. In Vahlsing's cross-examination of the DEP Commissioner, however, he specifically went into the hazardous waste portion and he has not pointed us to anywhere in the transcript where he later attempted to pursue the trial court's offer of editing the document. Thus, to the extent that Vahlsing is raising this issue on appeal, we conclude that the claim of prejudice was not properly preserved and review only for obvious error. *See* M.R. Evid. 103(d). Although the references may have been excludable under M.R. Evid. 403, our examination reveals that Vahlsing has not documented that the proceeding was thereby tainted or that he was denied a fair trial resulting in manifest injustice. *State* v. *Whiting*, 538 A.2d 300, 302 (Me. 1988).

was not required to inform the jury that it had granted the defendant's motion for acquittal on the first two specifications; it was sufficient to inform the jury simply that those matters were no longer before it for its consideration.

The tape recording of Harrison McCain was properly excluded. McCain was not a party under M.R. Evid. 801(d)(2) and the statement in question was not clearly against interest under M.R. Evid. 80(b)(3). The Dixon testimony concerning what he heard the parties to the sale transaction say about property "within the fence" was properly excluded under Rule 403.

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

Law Court Docket
No. PEN-86-505

STATE OF MAINE

v.

MANDATE

FRED VAHLSING

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Aroostook; and it having been heard and maturely considered;

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court Docket and certify to the Clerk of the Superior Court in the County of Aroostook the following mandate therein:

Judgment affirmed.

Dated: April 10, 1989.

FOR THE COURT:

_____

Associate Justice

Appendix B

STATE OF MAINE
PENOBSCOT, ss.

Supreme Judicial Court
Sitting as the Law Court
Law Docket No. PEN-86-505

STATE OF MAINE

v.

ORDER

FRED VAHLSING

Upon motion of appellant for reconsideration.
It is ORDERED that the motion be, and it hereby is, DENIED.

Dated: May 1, 1989

For the Court,

_____

David G. Roberts
Associate Justice

Appendix C

AGREEMENT

WHEREAS, there exist certain disputes relevant to machinery, equipment and other items located on the real estate of Aroostook Development Corporation (hereinafter called "Aroostook"), which real estate is presently owned by Maine Industrial Building Authority (hereinafter called "MIBA"), as a result of certain foreclosure proceedings which commenced on August 24, 1971, and

WHEREAS, Vahlsing, Inc., (hereinafter called "Vahlsing"), claims an interest in such machinery, equipment and other items, and

WHEREAS, MIBA, Aroostook and Maine Sugar Industries, Inc., (hereinafter called "MSI") also claim an interest in such machinery, equipment and other items, and

WHEREAS, there exist a Utilities Agreement and a Utilities Service and Lease Agreement and Amendment thereto between Vahlsing, MSI, Aroostook and Easton Development Corporation, (hereinafter called "Easton"), under which Vahlsing claims there are sums due Vahlsing from MIBA, and

WHEREAS, there are pending numerous legal proceedings involving Vahlsing, MIBA, MSI, Beet Farm Machinery Corporation (hereinafter called "BFMC"), Aroostook, Easton and Mainstay Corporation (hereinafter called "Mainstay").

NOW, THEREFORE, in the interest of resolving the foregoing disputes and determining the interests of the various parties to monies or property, the parties agree as follows:

1. Vahlsing, MSI, Aroostook, MIBA, BFMC and Easton will execute Stipulations of Dismissal with prejudice dismissing any and all claims which they or any one of them may have against each other concerning actions pending.

2. All machinery, equipment, spare parts, tools and any other personal property located on the real estate of Aroostook

which was foreclosed by MIBA on August 24, 1971 shall become the property of MIBA except:

(a) One (1) John Deere Tractor
(b) One (1) Potato Harvester
(c) One (1) Potato Platform Scale
(d) One (1) 50 lb. Potato Bagger Sewer.

In addition, certain machinery and equipment originally owned by BFMC and loaned by MSI to farmers in New Jersey and Pennsylvania shall also become the property of MIBA. Vahlsing, Easton, MSI, Aroostook and BFMC agree to give up all right, title and interest in and to any such aforesaid machinery, equipment, spare parts, tools and any other personal property, except as hereinbefore described in (a), (b), (c) and (d).

3. Vahlsing and MSI agree to assist MIBA in defending or prosecuting any and all claims which it may have in and to any of the aforesaid machinery, equipment, spare partes, tools and any other real or personal property as outlined in 2 herein so long as MIBA pays Vahlsing's and MSI's reasonable expenses relative thereto.

4. F. H. Vahlsing, Jr., on behalf of Vahlsing, MSI and Vahlco Corporation (hereinafter "Valco"), agrees to deliver to MIBA all plans, operating and maintenance information, including manuals, relating to the sugar plant, its machinery, equipment, spare parts and tools located on the former real estate of Aroostook, now owned by MIBA, in Vahlsing's, MSI's and/or Vahlco's possession, and hereby grants permission to any ohter party who has possession of the same, including BMA, the designers of the plant, to deliver them to MIBA.

5. MIBA agrees to give up all its right, title and interest in and to any machinery, equipment, spare parts, tools or other personal property located on the real estate of Easton and Vahlsing, excepting, however, any right, title and interest which MIBA may now or hereafter have by virtue of its guaranty of certain loans to Easton and more particularly de-

scribed in paragraph six. Vahlsing and Easton agree to give and convey to MIBA any machinery, equipment, spare parts, tools or other personal property presently located on the real estate of Easton and Vahlsing which can *only* be used on or in conjunction with sugar plant machinery or in connection with the operation of a sugar plant.

6. MIBA agrees to dismiss any and all claims against Vahlsing and MSI for monies due in consideration of Vahlsing and MSI giving up all of their right, title and interest in machinery, equipment, spare parts, tools and other personal property located on the real estate of Aroostook now owned by MIBA, except for any obligation which may now or hereafter exist by reason of MIBA's guaranty of certain loans to Easton relative to mortgages and security agreements on property of Easton.

7. MIBA, Vahlsing, Aroostook, Easton and MBI jointly and severally agree that the Utilities Agreement dated July 22, 1965, the Utilities Service and Lease Agreement dated November 1, 1966 and the Amendment to Utilities Service and Lease Agreement dated April 4, 1969, is terminated and acknowledged that all obligations of any of the above parties to any one or more of the others are fully satisfied and that all the machinery and equipment relating thereto located on the property of Easton and/or Vahlsing, is the property of Easton and/or Vahlsing.

8. The parties hereto agree to exchange mutual general releases from liability except as to matters herein reserved.

9. Vahlsing, Easton and MIBA mutually agree that each of them shall have the joint right to use the facilities owned or leased by the other relating to water (including Lake Christina, Lake Josephine and Prestile Stream), waste disposal systems, fresh water systems, fire protection systems, steam and electrical systems, including all mains, pumps, pipes, wires, generators and other equipment in connection therewith, provided that each party shall pay to the owner of the facilities

being utilized its share of the cost as determined by regularly accepted accounting principles in proportion to the services utilized by the party to the total services utilized by the parties, provided, however, that the capital cost of any equipment presently owned by one of the parties hereto and herein quit-claimed to another party or parties shall not be considered in the rate base of the party to whom quit-claimed in determining its share of the cost, and further provided that the water located in Lake Christina shall not be considered in such rate base. The control, operation and maintenance of Lake Christina and Lake Josephine, the earthen dam works, locks, spillway, and all other facilities relating thereto shall be the responsibility of Vahlsing. MIBA, Vahlsing and Easton each agree with the other to grant to the other easements to pass over the properties of the other for the purpose of drawing or discharging water from Lake Christina or into Lake Josephine, or from or into the Prestile Stream (waste water discharged into the Prestile Stream shall be downstream of the Vahlsing intake pump station), in the event the use of the present facilities becomes impracticable or undesirable.

10. Vahlsing, MIBA, Aroostook, Easton, BFMC, MSI and Mainstay agree to execute any and all documents necessary to carry out the substance of this agreement.

11. This Agreement shall be binding upon and inure to the benefit of the successors or assigns, of the parties hereto.

12. F. H. Vahlsing, Jr., and/or the other parties hereto in which he has an interest shall purchase the notes given by MSI to the beet farmers in Maine for certain of their crops, in an amount not to exceed One Hundred and Sixty Thousand Dollars ($160,000.00) without interest, provided that if said notes do equal $160,000.00, the balance shall be refunded to Vahlsing, and if said notes in the aggregate exceed said amount then payments thereon shall be prorated. Said amount shall be paid in escrow, notice shall be given by publication, and by regis-

tered or certified mail where possible, the noteholders being given a reasonable time within which to deposit their notes with the escrow agent.

This Agreement is further conditioned upon the funds to accomplish this settlement being properly appropriated.

13. In consideration of the foregoing Agreement MIBA agrees to pay to Vahlsing the sum of Five Hundred and Forty-Five Thousand Dollars ($545,000). Vahlsing, MSI, Mainstay and BFMC agree to waive any rights which they or any of them may have to any and all monies being held in escrow pursuant to the order of the Aroostook County Superior Court in the proceeding of Vahlsing, Inc. et al v. Maine Industrial Building Authority et al, Civil Action Docket No. 10543.

IN WITNESS WHEREOF, the parties hereto have hereby affixed their hands and seals.

DATED this 13th day of July 1973.

WITNESS:

Maine Industrial
Building Authority

_____ By_____
Chairman

Vahlsing, Inc.

_____ By_____
President

Aroostook Development Co.

_____ By_____
President

Easton Development Corp.

_____ By_____
President

Beet Farm Machinery Corp.

_____ By_____
President

Maine Sugar Industries, Inc.

_____ By_____
President

Mainstay Corporation

_____ By_____
President

F.H. Vahlsing, Jr.

_____ By_____

Vahlco Corporation

_____ By_____
President

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:

VAHLSING, INC., DEBTOR — BANKRUPTCY NO. 74-B-12 (CHAPTER XI)

ORDER AUTHORIZING TRANSFER
OF INTEREST IN PROPERTY;
ORDER AUTHORIZING COMPROMISE
AND SETTLEMENT OF INDEBTEDNESS

At Houston in said District on this 31st day of August, 1976, came on to be heard the Application for Authority to Transfer Interest in Property and the Application for Authority to Compromise and Settle Indebtedness (the Application), filed by Vahlsing, Inc., and its wholly owned subsidiary Mainstay Corporation, the Debtors in the above entitled and numbered proceeding (Debtor) the Maine Guarantee Authority, (MGA), XONU Intercontinental Industries, Inc., (XONU), Easton Development Corporation (EDC), and Easton Storage Corporation (EASTON), and the Court having conducted a hearing in open Court and all Applicants having appeared in open Court and other interested parties, including the United States of America by and through its instrumentality, the Economic Development Administration (EDA), among others, having appeared; and the Court having heard testimony on the Application and having heard arguments from Counsel for the Debtor and having heard from attorneys or representatives from the additional Applicants and other interested parties present at

said hearing; and considering the above the Court is of the opinion that the Debtor should be authorized to transfer the interest in property and to compromise and settle the indebtedness as set forth in the Application on the terms and conditions set forth therein and in the memorandum of understanding and the stipulation attached as Exhibit "A" to the Application, and the Court being of the opinion that the transfer, compromise and settlement would be in the best interest of the Estate and its unsecured creditors; and that the same will enable the Debtor to file an Amended Plan of Arrangement and have the same confirmed by proper order of this Court and the Court being of the opinion that sufficient cause exists for no notice to be given to all creditors pursuant to Rule 11-24, Chapter XI Rules, and no adverse interest appearing, it is therefore

ORDERED, that the Debtor should be, and it is hereby authorized to consummate and finalize that certain agreement with McCain Foods Limited, (McCain), and it is further authorized to settle and compromise those claims and indebtednesses with MGA, EDA, XONU, EDC, and EASTON all are more fully outlined and set forth in the Application and the Exhibit "A" thereto; and it is further

ORDERED, that the Debtor is specifically authorized to execute and perform all the obligations and undertakings contained in that certain memorandum of agreement which is attached as Exhibit "A" to the Application; and it is further

ORDERED, that the Debtor is specifically authorized to transfer by assignment and sale to McCain or its designee all of the Debtor's right, title and interest in and to the following property:

A. Leasehold interest in the potato processing facility located at Easton, Maine, owned by EDC, subject to mortgages and security interest in favor of MGA, EDA, XONU and any other lien interests that may be outstanding with respect thereto:

B. Equipment and machinery including the 7500 KVA Turbine engine and boilers, generators and equipment used in connection therewith referred to as the turbine system located at and/or in the potato processing facility located at Easton, Maine;

C. All utilities, utility agreements, easements, rights, and rights of way connected, or useful to the operation of the potato processing facility or land contiguous to the potato processing facility;

and it is further

ORDERED, that the Debtor be, and it is hereby authorized to sell all of its right, title and interest in and to approximately 200 acres of real property surrounding the potato processing facility owned by EDC more commonly known as the Thompson, Witherly and Fitzherbert Farms to XONU Intercontinental Industries on the terms and conditions set forth in the Application and the Exhibit "A" atached thereto said sale conditioned upon a credit of Sixty Thousand and No/100 Dollars ($60,000.00) of the Debtor's secured debt owing to XONU and further conditioned upon subsequent transfer by XONU of said property to McCain or its designee and it is further

ORDERED, that the Debtor is authorized to and shall receive from MGA, EDA, and EDC a full and final release and satisfaction of all debts and claims of any type whatsoever that may exist by and between the named entities and the Debtor, and it is further

ORDERED, that the Debtor and McCain or its designee shall receive from XONU a reduction in the amount of lien indebtedness that attaches to the potato processing facility owned by EDC and the equipment and machinery located therein and the 200 acres of land owned by the Debtor in the amount of Nine Hundred Twenty-Two Thousand Nine Hundred Sixty-Six and No/100 Dollars, ($922,966.00), and further that in connection with the delinquent payments of

approximately Eighty-Eight Thousand and No/100 Dollars ($88,000.00) owed by Debtor to XONU relative to the potato processing facility said indebtedness shall become a general unsecured debt rather than an administrative expense of this Proceeding, it is further.

ORDERED, that in consideration of XONU making the required payments to satisfy the Debtor's delinquent indebtedness on the currents payments owing to MGA and EDA and the conversion of Eighty-Eight Thousand and No/100 Dollars, ($88,000.00) of administrative expenses to a general unsecured debt, and in further consideration of the release of approximately Nine Hundred Twenty-Two Thousand Nine Hundred Sixty-Six and No/100 Dollars, ($922,966.00) of lien indebtedness on the potato processing facility and land to enable the Debtor to consummate the transaction with McCain or its designee, and in further consideration of the renewal and extension on more favorable terms of the balance of the XONU lien indebtedness to McCain or its designee in order to facilitate the consummation of the McCain transaction and in further consideration of the sale by XONU of certain real property owned by it to McCain to facilitate the consummation of the McCain transaction the Debtor is hereby authorized to issue to XONU a promissory note in the amount of Nine Hundred Twenty-Two Thousand Nine Hundred Sixty-Six and No/100 Dollars, ($922,966.00), payable over a ten (10) year period of time at six percent (6%) interest per annum, and the Debtor is further authorized to issue to XONU to secure the payment of said promissory note a lien and sercurity interest in and to all of the Debtor's real and personal property to which the Debtor retains any right, title and interest subsequent to the consummation of the McCain transaction, and it is further

ORDERED, that except as modified with respect to XONU, the property which shall be transferred by the Debtor to McCain, or its designee, shall be subject to all valid and existing liens and security interests as they may appear, and it is further

ORDERED, that Debtor will grant to the Internal Revenue Service, (IRS), a first mortgage in the amount of Eighty-Five Thousand and No/100 Dollars ($85,000.00), to secure payment of any sum due to IRS, on the Powers Fresh Potato Warehouse, land thereunder and adjacent thereto and will deliver to IRS a certified check in the amount of One Hundred Seven Thousand and No/100 Dollars, ($107,000.00), both obligations owing to the IRS to be performed prior to the closing with McCain and prior to the closing conveying the Monte Alto, Texas, water and sewer system, and further that upon performance by Debtor of the above obligations to the IRS, the IRS is hereby ordered to issue a Certificate of Partial Discharge which will discharge IRS liens on those items which are to be conveyed to McCain, NAC, and [illegible] it is further

ORDERED, that the transfer to McCain will be closed at the office of Rudman, Rudman & Carter, Bangor, Maine, on September 1, 1976, and that upon closing of the same McCain will be granted possession of the potato processing plant owned by EDC. At closing all payments and documents contemplated by the Application shall be held in escrow by McCain's counsel until September 13, 1976. The transfer and sale will become final on September 13, 1976, and the documents and payments will be distributed and made provided no notice of appeal of this order has been filed, and it is further

ORDERED, that in the event any appeal is filed to this Order within ten (10) days after the entry of the same, McCain shall give up possession of the potato processing plant owned by EDC, the documents and payments held in escrow shall be returned to the granting parties and the assignment and sale to McCain, the compromise and settlement with MGA, EDA, and XONU and all agreements executed as part of the assignment and transfer and the compromise and settlement shall be terminated and deemed null and void without further order of

this Court and without liability to McCain or its escrow agent, and it is further

ORDERED, that the sale and transfer to McCain and the acquiescence of EDA to the same and to the compromise and settlement of its debt as set forth in the Application is specifically conditioned upon the full compliance by appropriate parties with the terms and conditions of the Stipulation and Consent attached hereto as Exhibit "I" and incorporated herein.

Entered at Houston, Texas, this 31st day of August, 1976.

_____

JOHN R. BLINN, BANKRUPTCY JUDGE

AGREED AND APPROVED
AS TO FORM AND CONTENT

VAHLSING, INC.

By:_____
ITS:_____

Mainstay Corporation,

BY:_____

ITS:_____

Maine Guarantee Authority,

BY:_____

ITS:_____

Easton Development Corporation,

BY:_____

ITS:_____

TRUE COPY I CERTIFY
ATTEST:
V. Bailey Thomas, Cl.

By:_____

Easton Storage Corporation,

BY:_____

ITS:_____

XONU Intercontinental Industries,

BY:_____

ITS:_____

Economic Development Administration,

BY:_____

ITS:_____

McCain Food Limited

BY:_____

ITS:_____

Appendix E

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, That Vahlsing, Inc., a Delaware corporation with a place of business in Easton, County of Aroostook, State of Maine, pursuant to authority granted in the matter of Vahlsing, Inc., Debtor, in the United States District Court for the Southern District of Texas, Brownsville Division, by the Bankruptcy Judge of said Court, for consideration paid by McCain Foods, Inc., a corporation with a place of business in Washburn, County of Aroostook, does hereby grant, sell, convey, transfer, and deliver unto the said McCain Foods, Inc., the following described goods and chattels, namely:

All furniture, fixtures, equipment, turbine systems, machinery, tools, vehicles, and other personal property belonging to Vahlsing, Inc., located on the property of Easton Development Corporation in Easton, Maine, and used now or formerly in connection with the Potato Processing Plant business now or formerly operated by Vahlsing, Inc. in Easton, Maine, including but not limited to the items listed in Schedule A attached hereto.[*]

TO HAVE AND TO HOLD all and the singular the said goods and chattels unto the said McCain Foods, Inc., its successors and assigns, to its own use and behoof forever.

The undersigned covenants with the said McCain Foods, Inc. that it is the lawful owner of these goods and chattels, and that they are free from all encumbrances, and that it has good right to sell the same and it will warrant and defend the same unto the said McCain Foods, Inc., and guaranty that they shall be free from claims and demands of all persons, except Economic Development Administration, Maine Guaranty Authority or any interest of Easton Development Corporation.

[* Schedule A is a voluminous compilation of various property not at issue here.]

IN WITNESS WHEREOF, Vahlsing, Inc. has caused this to be signed as an instrument under seal by F. H. Vahlsing, Jr., its President, duly authorized, this first day of September, 1976.

Witness:

_____

Vahlsing, Inc.

By_____
President

CONSENT BY MORTGAGEE

Economic Development Administration, United States Department of Commerce, assignee of Small Business Administration, hereby assents to the above sale of goods and chattels pursuant to the terms of the chattel mortgage from Vahlsing, Inc. to Small Business Administration dated September 21, 1964, recorded in Southern Aroostook Registry of Deeds, Book 924, Page 144, and assigned by Small Business Administration to Economic Development Administration, U.S. Department of Commerce.

Witness:

_____

Economic Development Corporation

By_____

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:

VAHLSING, INC., BANKRUPTCY NO. 74-B-12

DEBTOR (CHAPTER XI)

NOTICE OF ORDER OF CONFIRMATION
OF PLAN AND DISCHARGE

TO THE DEBTOR, ITS CREDITORS, AND OTHER PARTIES IN INTEREST:

Notice is hereby given of the entry of an Order of this Court on August 1, 1979, confirming the Debtor's Plan dated July 10, 1978, and providing further that:

A. Except as otherwise provided or permitted by the Plan or such Order:

(1) The above named debtor is released from all dischargeable debts;

(2) Any judgment theretofore or thereafter obtained in any court other than this Court is null and void as a determination of the personal liability of the Debtor with respect to any of the following:

(a) Debts dischargeable under § 17a and b of the Bankruptcy Act;

(b) Unless theretofore or thereafter determined by Order of this Court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) Unless theretofore or thereafter determined by Order of this Court to be nondischargeable, debts alleged to be

excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on July 14, 1974, the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefore or has submitted to this Court a signed statement of intention to make such a demand;

(d) Debts determined by this Court to be dischargeable under § 17c(3) of the Act.

B. All Creditors whose debts are discharged by said Order and all Creditors having claims of a type referred to in paragraph (A)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above named Debtor.

ENTERED at Houston, Texas, this 3rd day of August, 1979.

JOHN R. BLINN
BANKRUPTCY JUDGE

Appendix G

STATE OF MAINE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

ADMINISTRATIVE ORDER
IN THE MATTER OF

F. H. VAHLSING, JR. PRESIDENT and VAHLSING, INC.	DESIGNATION OF UNCONTROLLED HAZARDOUS SUBSTANCE
Proceeding Under 38 M.R.S.A. Section 1365, Uncontrolled Hazardous Substance Sites	SITE & ADMINISTRATIVE ORDER

JURISDICTION

This designation of Uncontrolled Hazardous Substance Site and Administrative Order is issued pursuant to the authority vested in the Commissioner of Environmental Protection under the Uncontrolled Hazardous Substance Sites Law, 38, M.R.S.A., Sections 1361-1370.

FINDINGS OF FACT

1. F.H. Vahlsing, Jr is President of Vahlsing, Inc. Vahlsing, Inc. is a corporation organized and existing under the laws of the State of Delaware. F.H. Vahlsing, Jr. and Vahlsing, Inc. are hereinafter referred to as "Vahlsing."
2. Vahlsing is the owner of one building, formerly a potato house, and was the owner of that building during which

time that chemicals, including hazardous substances, were brought to and placed in the building. The building is located on land in Easton, Maine, owned by Bangor and Aroostook Railroad. The land is described as being Lot 19 on Map 14 which is on file at the Assessor's Office in the Town of Easton.

Vahlsing has leased the land upon which the building is located from the Bangor and Aroostook Railroad since 1971. In March 1983, Vahlsing received notification from the Railroad that the property lease would be cancelled if the rent for the years 1978-1983 was not paid. The rent was paid in July 1983 although a new lease agreement which had been forwarded to Vahlsing was never fully executed. According to the Railroad, Vahlsing continues to lease the property.

The building and land are hereinafter referred to as "the site."

3. Over 2,500 gallons of chemicals, including hazardous substances are located at the site in containers of various sizes and condition.
4. Vahlsing is storing or has disposed of, among others, the following hazardous substances at the site:

   a. 2,4-dinitro-6-(1-methylpropyl)-phenol (dinoseb)
   b. arsenic
   c. corrosive liquid

15. These substances exhibit the following characteristics and threats to public health and safety in the event they are released into the environment:

   a. 2,4-dinitro-6-(1-methylpropyl)-phenol (dinoseb)

      Dinoseb is highly toxic by oral and dermal exposure. Human deaths have occurred from ingestion, with convulsions and vomiting seen. Long term exposures of

some animals to non-fatal doses have caused cataracts and reduced growth. The acute oral LD_{50} (rat) is reported variously as 25-30 mg/kg.

This substance is classified as acutely toxic hazardous waste #P020 under the Department of Environmental Protection's Hazardous Waste Management Rules.

b. Arsenic Compound

The signs and symptoms of arsenic poisoning vary in degree and timing depending on the form and amount of arsenic and other factors. The major characteristics of acute arsenic poisoning are profound gastrointestinal damage and cardiac abnormalities. The signs include excruciating abdominal pain, forceful vomiting, cramps in the legs, restlessness and spasms. A feeble and irregular pulse and other symptoms of collapse, prostration, stupor, convulsions, paralysis, collapse and death in coma have been described. Environmental exposure to arsenicals has been correlated with a high skin cancer risk among populations exposed to sunlight, suggesting interference with repair of DNA damage.

This substance is classified as EP Toxic Hazardous Waste #D004 under the Department of Environmental Protection's Hazardous Waste Management Rules.

c. Corrosive Liquid

A solution of this strength of acidity is comparable to a 0.6% solution of hydrochloric acid (muriatic acid). It is corrosive, dangerous to eyes and irritating to less sensitive tissues.

This substance is classified as Hazardous Waste #D002 due to corrosivity under the Department of Environmental Protection's Hazardous Waste Management Rules

6. The substances described in Paragraph 5 have been designated as hazardous wastes by the Board of Environmental Protection pursuant to 38 M.R.S.A., Section 1303-A. They are, accordingly, hazardous substances within the meaning of 38 M.R.S.A., Section 1361. These substances are being or have been stored or disposed of at the site in such a manner that they may be released or discharged into the soil, groundwater or ambient air.

7. Vahlsing has violated 38 M.R.S.A., Section 1306, and related Hazardous Waste Management Rules for operating a waste facility without a permit issued by the Board.

   In addition, Vahlsing has violated Hazardous Waste Management Rules relating to Standards for the Generators of Hazardous Waste.

8. The structural integrity of the building is rapidly decreasing. A portion of the roof has collapsed and other roof-supporting structures have become distorted from the stress. Falling timbers have the potential of rupturing the containers and releasing the hazardous substances. A majority of the containers of hazardous substances are located within a flooded area of the potato house. Contact with this water decreases the life expectancy of the containers. A release of hazardous substance from either a ruptured or rusted container will contaminate this water and any surface water or ground water that it comes in contact with.

9. On December 1, 1983, a Letter of Warning was mailed from this Department to F.H. Vahlsing, Jr., directing him to properly remove the chemicals from the site. No reply was received by this Department.

   On January 17, 1984, a second Letter of Warning was mailed to F.H. Vahlsing, Jr. and F.H. Vahlsing, Jr. signed for the certified letter.

On July 5, 1984, the Department mailed, by certified mail, two letters to F.H. Vahlsing, Jr., at two different locations. The letters explained the Department's intention to declare the site uncontrolled if plans for the site clean-up were not received within 5 days of receipt of the notification. Both letters were returned unclaimed.

BASED upon the above Findings of Fact, the Commissioner concludes and finds that:

1. Vahlsing stores or has disposed of hazardous substances, as defined in 38 M.R.S.A., Section 1362, at the site;
2. Vahlsing and the Bangor and Aroostook Railroad are responsible parties as defined in 38 M.R.S.A., Section 1362;
3. Hazardous substances located at the site may create a danger to public health or safety of persons or to the environment;
4. Continued danger to public health or safety of any person or to the environment exists as a result of the lack of security at the site and the presence and condition of the hazardous substances on the site.
5. The actual or threatened releases of hazardous substances from the site pose a threat or hazard to the public health, safety and welfare and to the natural environment; and
6. Immediate action is necessary to abate the threat, danger or hazard to public health, safety and the environment.

THEREFORE, pursuant to 38 M.R.S.A., Section 1365, the Commissioner hereby Designates the Vahlsing site in Easton, Maine as an Uncontrolled Hazardous Substance Site.

ORDER

Vahlsing, is hereby ordered and directed to:

1. Within five (5) days:

A. Prepare a plan to properly remove all hazardous wastes, contaminated soil and water from the site for transport to and disposal at a licensed hazardous waste facility, submit that plan to the DEP for its review and approval, and implement that plan as approved by the DEP within five (5) days of DEP approval.

2. Vahlsing shall comply immediate with this Order.

DONE AND DATED AT AUGUSTA, MAINE THIS 27th DAY OF AUGUST, 1984.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

By:_____
Henry E. Warren, Commissioner

RIGHTS OF REVIEW AND APPEAL

Vahlsing may apply to the Board of Environmental Protection for a hearing on this Order. The hearing shall be held by the Board within 3 days after receipt of the application. Within 7 days after the hearing, the Board shall make findings of fact and continue, revoke or modify the Order. The decision by the board may be appealed to Superior Court in accordance with the Maine Administrative Procedure Act, 5 M.R.S.A., Section 11001, *et seq.*

Appendix H

STATE OF MAINE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER
IN THE MATTER OF

F.H. VAHLSING, JR., AND VAHLSING, INC. PROCEEDING UNDER 38 M.R.S.A. § 1365, UNCONTROLLED HAZARDOUS SUBSTANCE SITES	APPEAL OF DESIGNATION OF UNCONTROLLED HAZARDOUS SUBSTANCE SITE AND ORDER

JURISDICTION

This application for hearing on the Commissioner's designation of uncontrolled hazardous substance site and order dated August 27, 1984 (the "Order") is before the Board pursuant to 38 M.R.S.A. § 1365(4).

FINDINGS OF FACT

1. On August 27, 1984, the Commissioner designated a building in the Town of Easton as an uncontrolled hazardous substance site. The building contained several hazardous wastes described in the Order. The designation identified the building as "located on land in Easton, Maine, owned by Bangor and Aroostook Railroad" and stated that the land was described "as being Lot 19 on Map 14 . . . on file at the Assessor's Office . . .." (Order, ¶ 2.)

2. The Order designated Fred H. Vahlsing, Jr. and Vahlsin, Inc., among others, as responsible parties within the meaning of 38 M.R.S.A. § 1362.

3. On August 31, 1984, F.H. Vahlsing, Jr. filed a request for a hearing on the Order on behalf of Vahlsing, Inc. Mr. Vahlsing requested that such a hearing be held not earlier than November 5, 1984. In his request, Vahlsing argued that the listing of responsible parties should be amended.

4. On December 19, 1984, the Board held the hearing requested by Mr. Vahlsing on behalf of Vahlsing, Inc. Mr. Vahlsing testified and submitted various exhibits. The staff of the Department presented the testimony of Duncan Beaton, Town Manager of the Town of Easton, William Houston, Vice President and General Counsel of Bangor and Aroostook Railroad, and Gerald Rudman, counsel for McCain Foods, Inc., and also submitted several exhibits. The only issue raised at the hearing was whether Vahlsing, Inc. was a responsible party.

5. Based on the evidence introduced at the hearing, the Board finds and concludes as follows:

a. In 1971, Vahlsing, Inc. leased a portion of the land designated as Lot #19 on tax map #14. All of Lot #19 is owned by the Bangor and Aroostook Railroad, which has owned it since the 1930's. The Bangor and Aroostook Railroad has and does pay taxes on this real property. The portion of Lot #19 leased by Vahlsing, Inc. is identified on a Bangor and Aroostook Railroad map and in the lease as Lots 50 through 57. In July, 1983, Bangor and Aroostook Railroad deducted the rent due on this land from the amount it paid Vahlsing, Inc. in connection with an unrelated transaction. Mr. Vahlsing was informed of this deduction and did not object to it at the time.

b. Pursuant to the lease, Vahlsing, Inc. placed a building on the land described in paragraph 5(a) above. F.H. Vahlsing, Jr. on behalf of Vahlsing, Inc. has consistently paid taxes on this building.

These tax payments include one as recently as January 6, 1984.

c. F.H. Vahlsing, Jr. went to the building described in 5(b) above with Duncan Beaton, Town Manager of the Town of Easton, in the fall of 1983. He told Mr. Beaton that he would consider removing or selling the contents of that building and at all times acted as if the building and materials within it were his property.

d. The wastes stored in the building identified in paragraph 5(b) are hazardous wastes. This building is the building that is the subject of the Order.

e. Mr. Vahlsing's testimony with respect to the existence and ownership of the building was not credible. Mr. Vahlsing first asserted that there was no building on Map #14, Lot #19 and proffered an exhibit purportedly signed by a registered surveyor certifying that. However, this exhibit showed only a portion of Lot #19, excluding the portion of Lot #19 on which the building that is the subject of the Order is located. Mr. Vahlsing then attempted to suggest that a building had been located on Lot #19 but had burned down. Finally, Mr. Vahlsing testified that the building was the property of McCain Foods, notwithstanding the testimony of Mr. Gerald Rudman, counsel for McCain Foods, that when McCain purchased various properties from Vahlsing, Inc., the transaction expressly excluded any real property belonging to the Bangor and Aroostook Railroad, and that Mr. Rudman understood that that exclusion included buildings.

Based upon the above findings of fact, the Board finds and concludes that Vahlsing, Inc., the only party seeking a hearing

on the Order, is a responsible party within the meaning of 38 M.R.S.A. § 1362, and that the Order properly identifies the building in question.

Therefore, pursuant to 38 M.R.S.A. § 1365, the Board affirms the Commissioner's designation of uncontrolled hazardous site and continues the order issued pursuant to that designation.

Done and dated in Augusta, Maine this 19th day of December, 1984.

BOARD OF ENVIRONMENTAL PROTECTION

By:_____

Samuel Zaitlin, Chairman

Appendix I

STATE OF MAINE KENNEBEC, SS.	SUPERIOR COURT CRIMINAL ACTION DOCKET NO. 85-128
State of Maine v. Fred H. Vahlsing, Jr.,	Indictment for Violation of 17-A M.R.S.A. § 451 (Perjury), Class C

The Grand Jury charges:

On or about December 19, 1984, in the County of Kennebec, State of Maine, Fred H. Vahlsing, Jr., did, in an official proceeding, namely a hearing before the State of Maine Board of Environmental Protection on an administrative order (hereafter the "Order" — a copy of which is attached hereto and incorporated herein by reference), issued by Henry E. Warren, Commissioner of Environmental Protection, and dated August 27, 1984, make false statements under oath, namely:

(1) that there then was no building on land in Easton, Maine, the land and building being described in paragraph 2 of the Order as the site containing waste pesticides and other hazardous wastes;

(2) that the building identified in the Order as containing waste pesticides and other hazardous wastes wasw not owned by Vahlsing, Inc.; and

(3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976,

the said Fred H. Vahlsing, Jr. not believing the statements to be true and the said statements being material because, if believed by the Board, the Board would have been likely to find that, contrary to the Commissioner's conclusion and find-

ing on page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451 (1) (A) (1983).

A True Bill

_____

Foreman

Dated: 3/5/85

Appendix J

STATE OF MAINE

AROOSTOOK, ss.

Superior Court
Civil Action Docket #85-16

F.H. VAHLSING, JR.
Plaintiff

vs.

STATE OF MAINE B.E.P.
Defendant

ORDER

This case is a Rule 80C Appeal from final State of Maine Board of Environmental Protection action, taken under the Uncontrolled Hazardous Substances Sites Act (38 MRSA § 1361-1370).

After investigation the Defendant determined that the Plaintiff was in violation of the Act and ordered him to cease or prevent that activity. The Corporate Plaintiff was served with the order, the individual was not. In this administrative order, the corporation and individual were considered together, that is to quote from the order: "F.H. Vahlsing, Jr., and Vahlsing, Inc. are hereinafter referred to as 'Vahlsing'."

The corporation, after service, demanded and received a hearing before the Defendant, after which the Defendant issued a decision with findings of fact and conclusions holding the Corporate Plaintiff was a "responsible party" under the Act, finding that the Corporation was the only party seeking a hearing on the administrative order. However, the caption of the decision named the individual Plaintiff, and the decision states "Therefore, pursuant to 38MRSA § 1365, the Board

affirms the Commissioner's designation of uncontrolled hazardous site and continues the order issued pursuant to that designation.

The individual Plaintiff appealed the decision on the grounds he was never served pursuant to Section 1365(3). The Defendant admits no service was made on him and suggests he had actual knowledge and waived service in appearing at the hearing or, in the alternative, has no standing to appeal.

The transcript of the evidence at the hearing makes clear he appeared as President of the Plaintiff Corporation and not individually. See pp. 1, 8, 9, 19, 13.

A fair reading of the administrative order and the decision together shows that the individual Plaintiff's interest could be affected. He could be subject to an action to compel under Section 1365(5), and, therefore, has standing to bring a Rule 80C appeal. He is, after all, a named party, and his standing to appeal rests upon something more than a mere particularized injury. Matter of *Lappie*, 377 A.2d 441 (Me. 1977); 5 MRSA § 8001 (6) (A).

Wherefore, ordered

(1) Appeal sustained.

(2) The decision of Defendant of August 17, 1984 is reversed with respect to F.H. Vahlsing, Jr.

May 2, 1986
Date

Hon. Herbert Silsby, Justice
Superior Court

Appendix K

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
Civil Action,
Docket No. CV-85-17

VAHLSING, INC.
Plaintiff
v.
STATE OF MAINE BOARD OF ENVIRONMENTAL PROTECTION
Defendant

ORDER

On May 9, 1986, the court gave counsel until May 27, 1986 to file briefs on the question of which party had the burden of proof. The court also found that there was sufficient evidence supporting the BEP decision. The finding was based upon the assumption the defendant had the burden of proof, but not made clear in the order of May 9, 1986.

The court has not found, nor have counsel pointed out any statute or rule or decision setting forth the land owner or operator (Responsible Party, § 1362(2)) has the burden of proof under the Hazardous Sites statutes.

The burden of proof is of fundamental importance and unless the legislature has otherwise provided the party or agency making an assertion has the burden of proving it. It was error of law to place the burden on Vahlsing, Inc.

The Hazardous Substance Sites Act provides for some four steps for enforcement. First the commissioner may investigate and determine and order a responsible party to cease or prevent a hazardous activity. Section 1365(1). From this order the alleged responsible party may appeal to the board. Next the Attorney General may file suit for injunctive relief to abate, clean up, or mitigage the hazard. Section 1365 (4) (5). And lastly the Attorney General may sue for any clean up costs and the statute clearly provides the state has the burden of proof that a defendant is a responsible party. The responsible party has several affirmative defenses. Section 1367.

The statutory scheme therefore contemplates the state has the burden of proof. It does not make sense that the state has the burden of proof at one step and not the others, and it is thereby also clear the legislature had the burden of proof in mind. The legislative intent it follows must be inferred that the state has the burden of proof at all steps in the process of enforcement. If the legislature intended otherwise they could easily have said so.

Wherefore, order

Appeal sustained. Decision of the board vacated, and remanded to the commission for new hearing in accordance with this order.

Dated: June 4, 1986

_____

Herbet T. Silsby II
Justice, Superior Court

Appendix L

STATE OF MAINE
SUPERIOR COURT **JUDGMENT AND COMMITMENT**

Docket No.	County	Date	D.O.B.
CR-85-652	Penobscot	December 18, 1986	8/23/26

Defendant's Name	Residence
State of Maine v. Fred H. Vahlsing, Jr.	1119 Ave. E, McAllen, Texas 78501

Offenses charged:	Offenses convicted:	Charged by:
		☒ indictment
		— information
		— complaint
PERJURY (CLASS C)	PERJURY (CLASS C)	Convicted on
		— plea of guilty
		— plea of Nolo
		☒ jury verdict
Plea Not Guilty		— court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

☒ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

☒ The custody of the Commissioner of the Department of Corrections, at a facility designated by him, to be punished by imprisonment for a term of:
One Year

☐ The County Jail to be punished by imprisonment for a term of _____

☒ Execution stayed to PENDING APPEAL

☐ IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF _____ DOLLARS TO THE CLERK OF COURTS IN THE ABOVE NAMED COUNTY

☐ Execution stayed to

☐ IT IS ORDERED THAT THE DEFENDANT FORFEIT AND PAY THE SUM OF _____ DOLLARS AS RESTITUTION, THROUGH THE DIVISION OF PROBATION AND PAROLE.

☐ Execution stayed to

☐ IT IS ORDERED THAT EXECUTION OF THE FOREGOING SENTENCE AND COMMITMENT (AS IT RELATES TO CONFINEMENT) (AS IT RELATES TO A FINE) BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF _____ UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN.

☒ IT IS ORDERED THAT ALL BUT Sixty Days OF THE FOREGOING SENTENCE BE SUSPENDED. THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT Penobscot County Jail

☐ IT IS ORDERED THAT PURSUANT TO 17-A M.R.S.A. § 1201 THE DEFENDANT BE UNCONDITIONALLY DISCHARGED.

FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

Justice Superior Court

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT.

A true copy. Attest:

Clerk of Courts

Justice Superior Court

CR-1 Rev. 1/85

Appendix M

STATE OF MAINE
PENOBSCOT, ss.

Superior Court
Criminal Action
Docket No. 85-CR-652

STATE OF MAINE
Plaintiff

v.

MOTION FOR STAY

Frederick H. Vahlsing, Jr.,
Defendant

NOW COMES the Defendant, by and through his attorney, and states as follows:

1. Defendant was convicted of perjury on September 30, 1986.
2. By order dated December 18, 1986, he was sentenced to a term of imprisonment of one year, all but 60 days suspended.
3. By the same order, the execution was stayed pending appeal.
4. That on April 12, 1988, the Maine Supreme Judicial Court affirmed the decision of the Superior Court .
5. That as of this date the undersigned has not received the official copy of the Maine Supreme Judicial Court's decision, but does understand it to have affirmed the finding of the Superior Court.
6. That the defendant will be appealing to the United States Supreme Court within the time periods prescribed by law.

7. That to force the defendant to appear and serve his sentence would make the appeal to the Supreme Court moot and would impose undue hardship on the defendant.

8. That this court has the authority to stay execution of sentence pending appeal.

WHEREFORE, defendant prays that execution be further stayed pending appeal to the United States Supreme Court.

DATED: April 12, 1989

Bernard G. O'Mara, Esq.
Main Street, P.O. Box 336
Easton, Maine 04740

Appendix N

17-A M.R.S.A. § 451 (Perjury):

1. A person is guilty of perjury if he makes:

A. In any official proceeding, a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true; or

B. Inconsistent material statements, in the same official proceeding, under oath or affirmation, both within the period of limitations, one of which statements is false and not believed by him to be true.

2. Whether a statement is material is a question of law to be determined by the court. In a prosecution under subsection 1, paragraph B, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

3. It is an affirmative defense to prosecution under this section that the defendant retracted the falsification in the course of the official proceeding in which it was made, and before it became manifest that the falsification was or would have been exposed.

3-A. In a prosecution under subsection 1, paragraph A, evidence that the allegedly false testimony in the prior official proceeding was contradicted by evidence in that proceeding may not be a sufficient basis by itself to sustain a conviction for perjury.

4. It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not a competent witness in making the statement or was disqualified from doing so. A document purporting to be made upon oath or affirmation at

any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

5. As used in this section:

A. "Official proceeding" means any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding;

B. "Material" means capable of affecting the course or outcome of the proceeding.

6. Perjury is a Class C crime.

Appendix O

Chapter 13-B, Uncontrolled Hazardous Substance Sites, was enacted by 1983, c. 569, § 1, effective July 1, 1983.

§ 1361. Findings and purpose

The Legislature finds and declares that uncontrolled hazardous substance sites within the jurisdiction of the State present a hazard to all the people of the State and that hazard poses a threat or potential threat to the public health, safety or welfare, to the environment of the State and to owners and users of property near or adjacent to uncontrolled sites.

The Legislature further finds that adequate measures must be taken to ensure that the threats posed by uncontrolled hazardous sites are abated, cleaned up or mitigated promptly.

The Legislature further finds that it is in the public interest of the State and its citizens to provide the capacity for prompt and effective planning and implementation of plans to abate, clean up or mitigate threats posed or potentially posed by uncontrolled sites. This paramount state interest outweighs any burden, economic or otherwise, imposed by this chapter.

1983, c. 569, § 1, eff. July 1, 1983.

§ 1362. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Hazardous substance. "Hazardous substance" means:

A. Any substance identified by the board under section 1319-*O*;

B. Any substance identified by the board under section 1319;

C. Any substance designated pursuant to the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980, Public Law 96-510, Sections 101 and 102[1] (Superfund);

D. Any toxic pollutant listed under the United States Federal Water Pollution Control Act, Section 307(a);[2]

E. Any hazardous air pollutant listed under the United States Clean Air Act, Section 112;[3]

F. Any imminently hazardous chemical substance or mixture with respect to which the Administrator of the United States Environmental Protection Agency has taken action pursuant to the United States Toxic Substances Control Act, Section 7;[4] and

G. Waste oil as defined in section 1303.

2. Responsible party. "Responsible party" means any one or more of the following persons:

A. The owner or operator of the uncontrolled site;

B. Any person who owned or operated the uncontrolled site from the time any hazardous substance arrived there;

C. Any person who arranged for the transport or handling of a hazardous substance, provided that the substance arrived at the uncontrolled site; and

D. Any person who accepted a hazardous substance for transport, provided that the substance arrived at the uncontrolled site.

3. Uncontrolled hazardous substance site. "Uncontrolled hazardous substance site" or "uncontrolled site" means

---

[1] 42 U.S.C.A. §§ 9601 and 9602.
[2] 33 U.S.C.A. § 1317(a).
[3] 42 U.S.C.A. § 7412.
[4] 15 U.S.C.A. § 2606.

an area or location whether or not licensed, at which hazardous substances are or were handled or otherwise came to be located, if it is concluded by the commissioner that the site poses a threat or hazard to the health, safety or welfare of any person or to the natural environment and that action under this chapter is necessary to abate, clean up or mitigate that threat or hazard. The term includes all contiguous land under the same ownership or control and includes without limitation all structures, appurtenances, improvements, equipment, machinery, containers, tanks and conveyances on the site.

1983, c. 569, § 1, eff. July 1, 1983; 1985, c. 746, § 32; 1987, c. 517, § 29, eff. June 29, 1987.

§ 1363. Prohibited acts

No person may handle hazardous substances at an uncontrolled hazardous substance site in violation of any order issued under this chapter.

1983, c. 569, § 1, eff. July 1, 1983.

§ 1367. Liability; recovery by the State for abatement, clean up or mitigation costs and for damages

Each responsible party is jointly and severally liable for all costs incurred by the State for the abatement, clean up or mitigation of the threats or hazards posed or potentially posed by an uncontrolled site and for damages for injury to, destruction of or loss of natural resources of the State resulting from hazardous substances at the site or from the acts or omissions of a responsible party with respect to those hazardous substances. The commissioner shall demand reimbursement of costs and payment of damages to be recovered under this section and payment shall be made promptly by the responsible party or parties upon whom the demand is made. If payment is not received by the State within 30 days of the demand, the Attorney General may file suit in the Superior Court and, in addition to relief provided by other law, may seek punitive damages. Notwithstanding the time limits stated in this paragraph, neither a demand nor other recovery efforts against one responsible party may relieve any other responsible party of liability.

In any suit filed under this section, the State need not prove negligence in any form or matter by a defendant. The State need only prove that a defendant is a responsible party, as defined in section 1362, and the site poses or posed or potentially poses or posed a threat or hazard to the health, safety or welfare of any citizen of the State or the environment of the State, to which the acts or omissions of the defendant are or were causally related.

A person who would otherwise be a responsible party shall not be subject to liability under this section, if he can establish by a preponderance of the evidence that threats or hazards posed or potentially posed by an uncontrolled site, for which threats or hazards he would otherwise be responsible, were caused solely by:

1. Act of God. An act of God;

2. Act of war. An act of war;

3. Act or omission. An act or omission of a 3rd party who is not his employee or agent. A person seeking relief from liability for the acts or omissions of a 3rd party shall also demonstrate by a preponderance of the evidence that he exercised due care with respect to the hazardous substance and uncontrolled site concerned, taking into consideration the characteristics of that substance and site, in light of all relevant facts and circumstances and that he took precautions against foreseeable acts or omissions of any such 3rd party and the consequences that could foreseeably result from such acts or omissions; or

4. Combination. Any combination of the foregoing subsections.

Funds recovered under this section shall be deposited into the Uncontrolled Sites Fund and shall be used by the department to carry out the purposes of this chapter.

1983, c. 569, § 1, eff. July 1, 1983; 1987, c. 192, § 31.

Appendix P

STATE OF MAINE PENOBSCOT, ss:	SUPERIOR COURT Bangor, Maine Docket No. CR-85-652
STATE OF MAINE v. FRED. H. VAHLSING, JR.	ADDITIONAL MEMORANDUM #2 SUPPLEMENTING MEMORANDUM IN SUPPORT OF MOTION FOR ACQUITTAL previously filed

The trial of Fred H. Vahlsing, Jr. commenced on September 2, 1986 in the Penobscot County Superior Court before the Honorable Judge J. Smith.

During the trial, the Honorable Judge J. Smith ruled positively on the materiality of the statement allegedly made by Fred H. Vahlsing, Jr. at the Board of Environmental Protection Hearing on December 19, 1984, to wit:

> "(3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976"

The Court had previously dismissed in connection with the Indictment the other two statements of the Indictment, to wit:

> "(1) that there then was no building on land in Easton, Maine, the land and building being described in paragraph 2 of the Order as the site containing waste pesticides and other hazardous wastes;

> (2) that the building identified in the Order as containing waste pesticides and other hazardous wastes was not owned by Vahlsing, Inc.;"

Hence, the only statement remaining allegedly made by Fred H. Vahlsing, Jr. relative to the Indictment alleging perjury by Fred H. Vahlsing, Jr. was:

> "(3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976"

In connection with the statement remaining as outlined above (*hereinafter referred to as "THE STATEMENT"*) the *materiality* of such statement was, in fact, a nullity and of no effect on the Board of Environmental Protection Hearing for the following specific reasons:

I

(a) The Board of Environmental Protection Hearing was declared by the Honorable Herbert T. Silsby II to be of no consequence or effect due to the fact that contrary of the Laws of the State of Maine the Board of Environmental Protection had placed the burden of proof upon Vahlsing, Inc., a corporation organized and existing under the Laws of the State of Delaware and licensed to do business in the State of Maine. The Honorable Judge Herbert T. Silsby II specifically found in the Superior Court of Maine that the placing of the burden of proof upon Vahlsing, Inc. was not in accordance with the Laws of the State of Maine. Accordingly, such Board of Envi-

ronmental Protection Hearing was of no consecuence or effect upon Vahlsing, Inc. THE STATEMENT allegedly made by F. H. Vahlsing, Jr., representing Vahlsing, Inc., in view of the Honorable Herbert T. Silsby II's ruling, was not "capable of affecting the course or outcome of the proceeding" and thus was not material to the subject hearing. (See Judge Herbert T. Silsby II's Order dated June 4, 1986, which was marked and accepted as evidence in the trial, attached hereto as Exhibit A.)

(b) In addition, notwithstanding the erroneous title ascribed to the Hearing of December 19, 1984 transcript marked as an exhibit and entered into evidence at the trial (See first page of such transcript attached as Exhibit B.), Fred H. Vahlsing, Jr. was not a part of such Hearing and thus had no liability in any manner whatsoever in connection with such Hearing. (See order of the Honorable Judge Herbert T. Silsby II dated May 2, 1986 attached hereto as Exhibit C. Such Order was marked by Defendant, but not allowed into evidence by the Court as being immaterial.) In connection with Judge Silsby's Order relative to Fred H. Vahlsing, Jr., Fred H. Vahlsing, Jr. was not served in the matter of the Board of Environmental Protection and thus stood void of any obligation or liability relative to any findings in connection with such Hearing. Any statement made by anyone was totally immaterial as to Fred H. Vahlsing, Jr.'s obligations and/or responsibilities in connection with such Hearing. Thus, both Fred H. Vahlsing, Jr. and Vahlsing, Inc. could in no way be affected by any statements at such Hearing and thus all statements were immaterial to any findings by the official body at such hearing on December 19, 1984.

(c) Moreover, the Court should take judicial notice of a position brief in Civil Action No. CV-85-17 dated November 15, 1985, filed by Mr. James T. Kilbreth, attorney for the Department of Environmental Protection, which position brief (hereinafter referred to as "THE BRIEF") contains the following position and we herewith quote:

"Finally, neither retroactivity nor *ex post facto* problems exist with the Uncontrolled Hazardous Substance Site Law. That law is modeled on the federal superfund statute. CERCLA, 42 U.S.C. § 9601, *et seq*. In cases brought under that statute, courts have uniformly rejected due process, retroactivity, and *ex post facto* challenges. *See, e.g., State of New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042-45 (2d Cir. 1985); *J.V. Peters & Co.* v. *Ruckelshaus*, 584 F.Supp. 1005, 1010-11 (N.D. Ohio, 1984); *United States* v. *Price*, 577 F.Supp. 1103, 1112 (D. N.J., 1983).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition be denied and the decision of the Board of Environmental Protection affirmed.

DATED: NOVEMBER 15, 1985 Respectfully submitted,

JAMES T. KILBRETH
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
Tel. (207) 289-3051
Attorney for Respondent"

During the trial which commenced on September 2, 1986, there was unrefuted evidence that Vahlsing, Inc. owned the potato storage since at least 1961 up and to September 1, 1976 (September 1, 1976 termination of ownership being Defendant's position) and thus in considering it was the position of the State of Maine in the civil matter Docket No. CV-85-17 that "neither retroactivity nor *ex post facto* problems exist with the Uncontrolled Hazardous Substance Site Law", THE STATEMENT is totally immaterial and irrelevant since Vahlsing, Inc. had owned the building for at least fifteen (15) years prior to September 1, 1976, making THE STATEMENT totally immaterial as to the State's position in the Indictment that "if believed by the Board, the Board would have been likely to find that, contrary to the Commissioner's conclusion and finding on page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1) (A) (1983)" in view of the State of Maine's position that "neither retroactivity nor *ex post facto* problems exist with the Uncontrolled Hazardous Substance Site Law." Since the building had already been owned by Vahlsing, Inc. *for fifteen years*, what materiality could possibly be established in connection with a sale of the building by Vahlsing, Inc. to McCain Foods, Inc. in 1976? Thus, in view of such facts, THE STATEMENT could not have absolved Vahlsing, Inc. from liability as set forth by Mr. Kilbreth in THE BRIEF and thus was immaterial.

II

(a) During the trial, it was unrefuted that Vahlsing, Inc. filed bankruptcy on July 14, 1974 and was discharged from bankruptcy on August 1, 1979. (See Order Granting General Stay Order dated July 15, 1974 and Notice of Order of Confirmation of Plan and Discharge dated August 1, 1979, both documents marked as exhibits and admitted as evidence in the trial, attached hereto as Exhibits D & E, respectively.)

THE STATEMENT allegedly made by Fred H. Vahlsing, Jr., President of Vahlsing, Inc., as outlined above, referenced a sale to McCain Foods, Inc. by Vahlsing, Inc. to have occurred in 1976, which year Vahlsing, Inc. was in bankruptcy and under the specific jurisdiction and control of the United States District Court for the Southern District of Texas. Pursuant to the United States Supreme Court Decision entitled: *Ohio* v. *Kovacs, dba B & W Enterprises et al.*, Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 83-1020. Argued October 10, 1984 — Decided January 9, 1985, which Decision was handed down by the Supreme Court of the United States, Washington, D.C., (See United States Supreme Court Decision dated January 9, 1985 in connection with *Ohio* v. *Kovacs* attached as Exhibit F.), Vahlsing, Inc. had no obligation whatsoever for any acts (or non-acts) of Vahlsing, Inc. during the year 1976 relative to the Department of Environmental Protection of the State of Maine which occurred during the pendency of the bankruptcy of Vahlsing, Inc. and/or before the pendency of the bankruptcy of Vahlsing, Inc. As of the date of discharge of Vahlsing, Inc. from bankruptcy on August 1, 1979, pursuant to Section 367 and Section 173 of the Bankruptcy Act, and we herewith quote:

> "SEC. 367. Upon confirmation of an arrangement—
> (1) the arrangement and its provisions shall be binding

> upon the debtor, upon any person issuing securities or acquiring property under the arrangement and upon all creditors of the debtor, whether or not they are affected by the arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable; . . .
>
> SEC. 371. The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order, confirming the arrangement, but excluding such debts as, under section 17 of this Act, are not dischargeable."

Vahlsing, Inc. became relieved and insulated from any liability to the Department of Environmental Protection of the State of Maine for any acts (or non-acts) of Vahlsing, Inc. which occurred prior to and during the pendency of the bankruptcy of Vahlsing, Inc. from July 14, 1974 through August 1, 1979. In *Ohio* v. *Kovacs*, the Supreme Court of the United States of America specifically decided that upon confirmation and discharge a debtor as discharged from liability under environmental laws. Such Decision specifically applied to Vahlsing, Inc. in that Vahlsing, Inc. was discharged from any liability as of August 1, 1979 (date of confirmation and discharge from bankruptcy) in connection with claims of the Department of Environmental Protection of the State of Maine. According to THE BRIEF (by Mr. Kilbreth, as outlined above) the liability of Vahlsing, Inc. originated with the ownership by Vahlsing, Inc. of the "building" when the chemicals were first stored in such "building" in 1970 as set forth in the unrefuted evidence in the trial. *Thus, in view of Ohio v. Kovacs, THE STATEMENT allegedly made by F.H. Vahlsing, Jr. relative to a sale of the "building" in 1976 to McCain Foods, Inc. was totally immaterial and of no consequence as to what the Board would find.*

THE STATEMENT allegedly made by Fred H. Vahlsing, Jr. relative to a sale of personal property . . . "the building" . . . by Vahlsing, Inc. to McCain Foods, Inc. at the Board of Environmental Protection Hearing on December 19, 1984 was an absolute nullity and had no materiality whatsoever *by law*. THE STATEMENT could not in any manner, shape or form have affected *by law* the decision of the Board of Environmental Protection in view of the United States Supreme Court Decision in *Ohio* v. *Kovacs* (Exhibit F).

(b) *In connection with the Indictment*, and we herewith quote:

> "The Grand Jury charges:
>
> On or about December 19, 1984, in the County of Kennebec, State of Maine, Fred H. Vahlsing, Jr., did, in an official proceeding, namely a hearing before the State of Maine Board of Environmental Protection on an administrative order (hereinafter the "Order" — a copy of which is attached hereto and incorporated herein by reference), issued by Henry E. Warren, Commissioner of Environmental Protection, and dated August 27, 1984, make false statements under oath, namely:
>
> (1) that there then was no building on land in Easton, Maine, the land and building being described in paragraph 2 of the Order as the site containing waste pesticides and other hazardous wastes;
>
> (2) that the building identified in the Order as containing waste pesticides and other hazardous wastes was not owned by Vahlsing, Inc.; and
>
> (3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976,

the said Fred H. Vahlsing, Jr. not believing the statements to be true and the said statements being material because, if believed by the Board, the Board would have been likely to find that, contrary to the Commissioner's conclusion and finding upon page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1) (A) (1983). (Underlining added for emphasis.)

A True Bill

_____

Foreman

Dated: _____"

The Indictment, as charged by the Grand Jury, alleged that if THE STATEMENT was believed by the Board, the Board would have been likely to find that, contrary to the Commissioner's conclusion and finding upon page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1) (A) (1983). The presumptive charges of the Indictment fail by law *as set forth by the Supreme Court of the United States of America in its Decision in Ohio v. Kovacs.*

THE STATEMENT relative to an act of Vahlsing, Inc. which occurred in 1976 during the pendency of the Vahlsing,

Inc. bankruptcy while Vahlsing, Inc., its assets and actions, were specifically under the direct control of the United States District Court for the Southern District of Texas, pursuant to *Ohio* v. *Kovacs*, was an absolute nullity and could have no affect on the decision of the Board *by law*. THE STATEMENT relative to an act by Vahlsing, Inc. in 1976 did not have any materiality whatsoever in connection with, as charged by the Indictment, that "if believed by the Board, the Board would have been likely to find that, contrary to the Commissioners's conclusion and finding upon page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1) (A) (1983)" as outlined in the charges of the Indictment.

In effect, if the Board were to act in accordance with the Law of this land, the United States of America, it would not have mattered what the Board heard relative to any statement of Fred H. Vahlsing, Jr., Vahlsing, Inc. or anyone else relative to the year 1976 in connection with any act of Vahlsing, Inc. as the Board *by law* could not base any materiality to a statement concerning an act of Vahlsing, Inc. in the year 1976 as such statement was a nullity and of no consequence *by law* based upon the United States Supreme Court Decision in *Ohio vs. Kovacs*.

According to Maine Law "A false statement given under oath generally may be punished as perjury if and only if it was material to an issue or point of inquiry in the proceeding in which it was made . . .". (Underlining emphasis added.) THE STATEMENT allegedly made by Fred H. Vahlsing, Jr. was certainly not material in connection with the Board of Environmental Protection Hearing of December 19, 1984. THE STATEMENT was, in fact, a nullity and *by law* could have had *no affect*

upon any findings relative to actions of Vahlsing, Inc. for the year 1976 pursuant to the Decision of the United States Supreme Court in *Ohio vs. Kovacs*.

Accordingly, Fred H. Vahlsing, Jr. is entitled to an acquittal *by law* based upon a Decision of the United States Supreme Court on the factor of materiality since Vahlsing, Inc. was discharged from bankruptcy on August 1, 1979 and thus relieved from any obligations under the Department of Environmental Protection Laws of the State of Maine as of August 1, 1979 pursuant to *Ohio vs. Kovacs* regardless of whether the subject building was sold by Vahlsing, Inc. to McCain Foods, Inc. or not. Pursuant to *Ohio vs. Kovacs* THE STATEMENT referencing action of Vahlsing, Inc. in the year 1976 had no materiality *by law. Since THE STATEMENT was not material by law, an acquittal of Fred H. Vahlsing, Jr. should be granted.*

Respectfully submitted,

Fred H. Vahlsing, Jr.
Defendant, Pro Se

Supreme Court, U.S.
FILED
SEP 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2127.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1988.

FRED H. VAHLSING, JR.,
Petitioner,

v.

THE STATE OF MAINE,
Respondent.

MEMORANDUM OF FACTS SUPPORTING MOTION FOR RECONSIDERATION.

F. H. VAHLSING, JR., PRO SE,
1119 South E. Street,
McAllen, Texas 78501.
(512) 686-8581

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Supreme Court of the United States

Memorandum

9/11/89

Dear Mr. Vabalsing,

This material must be printed and 40 copies submitted in accordance with Rule 33.

The case is scheduled for conference on Sept. 25, 1989. It must be re-submitted before that date to considered at the conference.

Should you have questions please call

Kathy Tycz
(202) 479-2923

Table of Contents.

Memorandum of Facts Supporting Motion for Reconsideration filed by Fred H. Vahlsing, Jr., on August 17, 1989 with attached exhibits 1

Supplemental Memorandum of Facts filed by Fred H. Vahlsing, Jr. with attached exhibits 13

No. 88-2127.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1988.

FRED H. VAHLSING, JR.,
Petitioner,
v.

THE STATE OF MAINE,
Respondent.

Memorandum of Facts Supporting Motion for Reconsideration Filed By Fred H. Vahlsing, Jr. on August 17, 1989.

ATTN: Justice Byron R. White and/or any other Justices as the Court deems appropriate:

NOW COMES, F. H. Vahlsing, Jr., Petitioner, pro se, and says:

1. As pointed out in F. H. Vahlsing, Jr.'s *Motion for Reconsideration,* received by the Supreme Court of the United States on Thursday, August 17, 1989 at 2:50 p.m., F. H. Vahlsing, Jr. is requesting reconsideration of this Court's denial (by the Honorable William J. Brennan, Justice) on August 9, 1989 of

F. H. Vahlsing, Jr.'s Request for Stay of execution of F. H. Vahlsing, Jr.'s sentence until the Petition for Writ of Certiorari is granted and heard, or denied.

2. The basis of F. H. Vahlsing, Jr.'s request for such stay is specifically outlined in F. H. Vahlsing, Jr.'s "Request for Stay Pending Action on Petition for Writ of Certiorari to Supreme Court of the United States," filed on August 4, 1989 in that F. H. Vahlsing, Jr. does not believe he is *guilty* of the offense as charged.

3. As of the submission of this Memorandum, F. H. Vahlsing, Jr. has served thirty-nine (39) days of the Maine Superior Court sixty (60) day sentence for Class C perjury in the Hidalgo County Jail awaiting extradition to Maine pursuant to State of Maine 17-A Section 1253 (effective March 1, 1989).

4. In connection with a State District Court hearing at Edinburg, Texas on July 31, 1989 in Cause No. CR-473-89-E, expert medical witness, Dr. Benjamin Bujanda, of McAllen, Texas (subpoenaed for such hearing), testified under oath based upon the medical records of F. H. Vahlsing, Jr. (previously submitted to this Court in connection with F. H. Vahlsing, Jr.'s Request for Stay, filed August 4, 1989), relative to F. H. Vahlsing, Jr. being transported to Maine to serve the remaining (now) twenty-one (21) days of his Maine sentence, to wit:

> "Q. (By Mr. Blumberg) The question, doctor, was: What technical backup would be required during the transport of this patient given consideration of his medical background as you have just testified from Texas to the State of Maine?
> A. As a result of the conditions already described, actually an ambulance, an air ambulance, should be required safely to transfer him to any state, to anyplace that he would like to go in dealing with this type of problems (sic)."

(See page 46 of transcript of hearing of July 31, 1989 in the District Court, 275th Judicial District, Hidalgo County, Texas in Cause No. CR-473-89-E, a copy of which is attached hereto as Exhibit A.)

5. The two questions presented to the Supreme Court of the United States in F. H. Vahlsing, Jr.'s Petition for Writ of Certiorari are, to wit:

> I. Can a perjury conviction be upheld consistent with the Due Process Clause where the alleged false statement was made at a void administrative hearing and was immaterial to any valid admininstrative inquiry?
> II. Does an administrative proceeding which seeks to enforce ex post facto a statutory scheme concerning hazardous substances possess the legitimacy necessary to support a perjury prosecution for an alleged false statement made there?

F. H. Vahlsing, Jr. requests this Court to consider in connection therewith *whether* a person can be convicted of having made a perjurous statement if such statement *was never made*.

6. The transcript of the entire hearing before the Board of Environmental Protection on December 19, 1984 has been submitted to this Honorable Court in F. H. Vahlsing, Jr.'s Motion for Reconsideration on August 17, 1989. That Motion for Reconsideration requested this Honorable Court to carefully examine such transcript and satisfy itself that the statement in Count 3 of the Indictment (the only Count of such Indictment not dismissed) *was actually made by F. H. Vahlsing, Jr.* (and alleged to be perjurous), in that such statement *in fact was never made by F. H. Vahlsing, Jr.* A person should not be convicted of a crime if in fact such crime never occurred.

7. The whole affair of the conviction of F. H. Vahlsing, Jr. is born of political motivation to demonstrate to the people

of the State of Maine the police powers of the Environmental Laws of the State of Maine.

8. Although it is somewhat of an arduous task to read the transcript of the Board of Environmental Protection Hearing of December 19, 1984, at which it was alleged that the perjurous statement, Count 3 of the Indictment, was made by F. H. Vahlsing, Jr., since such transcript contains 215 pages, F. H. Vahlsing, Jr. requests this Honorable Court, *in order that justice be done,* to read such transcript and plainly see that the statement, Count 3 of the Indictment, to wit:

> "(3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976"

was never made. (If a murder was not committed, a person cannot be convicted of that murder.)

Throughout this entire egregious affair, to the knowledge of F. H. Vahlsing, Jr., neither the jury nor the Court at the time of the lower court trial of F. H. Vahlsing, Jr. read such transcript (except Judge Silsby of the Maine Superior Court, who *voided* such hearing) to ascertain if such statement was ever made even though the transcript was offered into evidence as State's trial exhibit #2 *and submitted* in the lower court trial of F. H. Vahlsing, Jr., Smith, J. A person should not be convicted of perjury pursuant to an alleged perjurious statement when in fact such statement was never made *notwithstanding the fact that the Superior Court of Maine, Silsby, J., on May 2, 1986 and June 4, 1986,* three months before the lower court trial of F. H. Vahlsing, Jr. commenced, *voided* that hearing of the Board of Environmental Protection due to its egregious nature. (See Orders of Superior Court of Maine, Silsby, J., attached as Exhibit B-1 and Exhibit B-2 hereto.)

For all of the foregoing reasons, F. H. Vahlsing, Jr. requests this great and honorable Court to take such time as necessary to read every page of the transcript of the Board of Environmental Protection hearing and ascertain *without a doubt* that the statement with which F. H. Vahlsing, Jr. was charged was never made by F. H. Vahlsing, Jr. (or even any statement resembling same) and accordingly, F. H. Vahlsing, Jr. cannot be guilty as charged.

Accordingly, this Honorable Court is requested to issue a stay of execution of the sentence of F. H. Vahlsing, Jr. until the Petition for Writ of Certiorari is granted and heard, or denied.

Respectfully submitted,

/s/ _____

F. H. Vahlsing, Jr.
Petitioner, Pro Se
1119 South E St.
McAllen, Texas 78501
(512) 686-8581

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached documentation was mailed via first class, United States mail, postage prepaid on the 21st day of August, 1989 to the following:

James T. Kilbreth, Esquire
Chief Deputy Attorney General
State House Station #6
Augusta, Maine 04333

/s/ _____
F. H. Vahlsing, Jr.

[1]

CAUSE NO. CR-473-89-E

THE STATE OF TEXAS	X	IN THE DISTRICT COURT
	X	
VS.	X	275th JUDICIAL DISTRICT
	X	
FREDERICK VAHLSING, JR.	X	HIDALGO COUNTY, TEXAS

TRANSCRIPT OF HEARING ON HABEAS CORPUS

Judge Juan R. Partida, Presiding

Clarisia Rodriguez, Deputy
Official Court Reporter
275th District Court
Hidalgo County
State of Texas

Exhibit A

. . . . . .

[46]

evidence. This doctor has not testified that it would require any kind of medical backup, your Honor, during the transportation of this individual.

THE COURT: Overruled. This witness may answer.

Q. (By Mr. Blumberg) The question, doctor, was: What technical backup would be required during the transport of this patient given consideration of his medical background as you have just testified from Texas to the State of Maine?

A. As a result of the conditions already described, actually an ambulance, an air ambulance, should be required safely to transfer him to any state, to anyplace that he would like to go in dealing with this type of problems.

Q. Thank you, doctor.

MR BLUMBERG: We have no further questions. We pass the witness.

MS. DOMINGUEZ: Your Honor, may we be given a short recess to review this doctor's medical records? They're about six or seven pages, your Honor; and they're written single spaced. If I may have an opportunity to read them before I cross-examine Dr. Bujanda please.

. . . . . .

[161]

CAUSE NO. CR-473-89-E

THE STATE OF TEXAS	X	IN THE DISTRICT COURT
	X	
VS.	X	275th JUDICIAL DISTRICT
	X	
FREDERICK VAHLSING, JR.	X	HIDALGO COUNTY, TEXAS

I, Clarisia Rodriguez, Deputy official court reporter for the 275th District Court of the State of Texas, do hereby certify that the foregoing pages contain a true and correct Transcript of Hearing in the above entitled and numbered cause had on the 31st of July, A.D., 1989; that I was present at the time of said proceedings and reported the same in machine shorthand.

I further certify that the attached exhibits, which have been offered and admitted, are the originals of the exhibits admitted, the originals having been marked by me and the time of said proceedings and kept under my care, custody, and control.

I further certify that the taxable cost to the Defendant for the Transcript of the hearing is $537.30.

Witness my hand this the 15th day of August, A.D., 1989.

/s/ _____

CLARISIA RODRIGUEZ, C.S.R.
Deputy Official Court Reporter
275th District Court
State of Texas

STATE OF MAINE

		SUPERIOR COURT
AROOSTOOK, ss.		CIVIL ACTION DOCKET #85-16
F.H. VAHLSING, JR.	*	
Plaintiff	*	
	*	
vs.	*	ORDER
	*	
STATE OF MAINE B.E.P.	*	
Defendant	*	

This case is a Rule 80C Appeal from final State of Maine Board of Environmental Protection action, taken under the Uncontrolled Hazardous Substances Sites Act (38MRSA § 1361-1370).

After investigation the Defendant determined that the Plaintiff was in violation of the Act and ordered him to cease or prevent that activity. The Corporate Plaintiff was served with the order, the individual was not. In this administrative order, the corporation and individual were considered together, that is to quote from the order: "F.H. Vahlsing, Jr., and Vahlsing, Inc. are hereinafter referred to as 'Vahlsing'."

The corporation, after service, demanded and received a hearing before the Defendant, after which the Defendant issued a decision with findings of fact and conclusions holding the Corporate Plaintiff was a "responsible party" under the Act, finding that the Corporation was the only party seeking a hearing on the administrative order. However, the caption of

the decision named the individual Plaintiff, and the decision states "Therefore, pursuant to 38MRSA § 1365, the Board affirms the Commissioner's designation of uncontrolled hazardous site and continues the order issued pursuant to that designation.

The individual Plaintiff appealed the decision on the grounds he was never served pursuant to Section 1365(3). The Defendant admits no service was made on him and suggests he had actual knowledge and waived service in appearing at the hearing or, in the alternative, has no standing to appeal.

The transcript of the evidence at the hearing makes clear he appeared as President of the Plaintiff Corporation and not individually. See p.p. 1,8,9,19,13.

A fair reading of the administrative order and the decision together shows that the individual Plaintiff's interest could be affected. He could be subject to an action to compel under Section 1365(5), and therefore, has standing to bring a Rule 80C Appeal. He is, after all, a named party, and his standing to appeal rests upon something more than a mere particularized injury. *Matter of Lappie,* 377 A.2d 441 (Me. 1977); 5MRSA § 8001(6)(A).

Wherefore, ordered

1) Appeal sustained.
2) The decision of Defendant of August 17, 1984, is reversed with respect to F.H. Vahlsing, Jr.

Date: May 2, 1986

/s/ _____

Hon. Herbert Silsby, Justice
Superior Court

STATE OF MAINE

AROOSTOOK, ss.	SUPERIOR COURT CIVIL ACTION DOCKET CV-85-17	
VAHLSING, INC. Plaintiff	*	
vs.	*	ORDER
STATE OF MAINE BOARD OF ENVIRONMENTAL PROTECTION Defendant	*	

On May 9, 1986, the court gave counsel until May 27, 1986 to file briefs on the question of which party had the burden of proof. The court also found that there was sufficient evidence supporting the BEP decision. The finding was based upon the assumption the defendant had the burden of proof, but not made clear in the order of May 9, 1986.

The court has not found, nor have counsel pointed out any statute or rule or decision setting forth the land owner or operator (Responsible Party, § 1362(2)) has the burden of proof under the Hazardous Sites statutes.

The burden of proof is of fundamental importance and unless the legislature has otherwise provided the party or agency making an assertion has the burden of proving it. It was error of law to place the burden on Vahlsing, Inc.

Exhibit B-2

The Hazardous Substance Sites Act provides for some four steps for enforcement. First the commissioner may investigate and determine and order a responsible party to cease or prevent a hazardous activity. Section 1365(1). From this order the alleged responsible party may appeal to the board. Next the Attorney General may file suit for injunctive relief to abate, clean up, or mitigate the hazard. Section 1365(4)(5). And lastly the Attorney General may sue for any clean up costs and the statute clearly provides the state has the burden of proof that a defendant is a responsible party. The responsible party has several affirmative defenses. Section 1367.

The statutory scheme therefore contemplates the state has the burden of proof. It does not make sense that the state has the burden of proof at one step and not the others, and it is thereby also clear the legislature had the burden of proof in mind. The legislative intent it follows must be inferred that the state has the burden of proof at all steps in the process of enforcement. If the legislature intended otherwise they could easily have said so.

Wherefore, ordered

> Appeal sustained. Decision of the board vacated, and remanded to the commission for new hearing in accordance with this order.

DATED: June 4, 1986

/s/ _____
Herbert T. Silsby II
Justice, Superior Court

AROOSTOOK COUNTY
ROBERT R. RUSH, CLERK
JUN 6 1986
FILED & ENTERED
SUPERIOR COURT

No. 88-2127.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1988.

FRED H. VAHLSING, JR.,
Petitioner,

v.

THE STATE OF MAINE,
Respondent.

Supplemental Memorandum of Facts Filed by Fred H. Vahlsing, Jr.

ATTN: Justice Byron R. White and/or any other Justices as the Court deems appropriate:

NOW COMES, F. H. Vahlsing, Jr., Petitioner, pro se, and says:

1. On August 22, 1989, F. H. Vahlsing, Jr., Petitioner, pro se, filed a Memorandum entitled: "MEMORANDUM OF FACTS SUPPORTING MOTION FOR RECONSIDERATION FILED BY FRED H. VAHLSING, JR. ON AUGUST 17, 1989." In connection with such Memorandum, it was pleaded by F. H. Vahl-

sing, Jr. that in connection with the Indictment in connection with his charge of perjury, there was but one Charge (Number 3) of the three Charges of such Indictment remaining.

2. As of August 22, 1989, F. H. Vahlsing, Jr. did not have available the following documentation which evidences beyond a doubt that Charges 1 and 2 of the Indictment were dismissed by the Trial Court below, Honorable Jack Smith, Justice of the Superior Court. Attached hereto as Exhibit A are copies of pages 82 and 91 of Volume 12, TRANSCRIPT OF PROCEEDINGS (with jury), dated September 17, 1986, which set forth that Charge 1 and Charge 2 of the Indictment were dismissed, leaving only Charge 3 of the Indictment. Also attached hereto as Exhibit B for the Court's convenience is a copy of the Indictment of F. H. Vahlsing, Jr. setting forth the 3 Charges, 2 of which, Charges 1 and 2, having been dismissed.

Respectfully submitted,

/s/ _____

F. H. Vahlsing, Jr.
Petitioner, Pro Se
1119 South E St.
McAllen, Texas 78501
(512) 686-8581

STATE OF MAINE — SUPERIOR COURT
Criminal Action
Docket No. CR-85-652
PENOBSCOT, ss. — Law Docket No. Pen-86-505

STATE OF MAINE)
)
)
vs.)
)
)
FRED H. VAHLSING, JR.)

VOLUME 12

TRANSCRIPT OF PROCEEDINGS
(with jury)

BEFORE:

HONORABLE JACK SMITH, JUSTICE OF THE SUPERIOR COURT

Penobscot County Courthouse
97 Hammond Street
Bangor, Maine

September 17, 1986

APPEARANCES:

For the State: JAMES T. KILBRETH, ESQ.
FERNAND LaROCHELLE, ESQ.

For the Defendant: J. HILARY BILLINGS, ESQ.
MARSHALL A. STERN, ESQ.
F. H. VAHLSING, JR.

Exhibit A

. . . . . .

[82]

unless you were there. And not until June of 1984 does he bring up, oh, I used to lease that but I stopped in 1982.

THE COURT: Donation of the building to the town, under the terms of the lease, after the lease is canceled, after the lease is canceled, the Railroad may, if it wishes, take the building itself. It may.

MR. KILBRETH: It may.

THE COURT: Or it may tear the damn thing down and bill Vahlsing for tearing it down. I take that statement as Freddie trying to get out of any obligation he might have to Bangor and Aroostook under the terms of that lease for the cost of removing the structure, which I saw myself and is clearly not in very good shape, which might well be a structure which is beyond repair and would have to be torn down rather than fixed up. That why Bangor and Aroostook has that kind of language in its lease. But all of those obligations continue after the termination of the Permit and Agreement, after there is no longer a tenancy under it.

And so, as to one and two, I do not feel that there is sufficient evidence to go to the jury. I do feel that there is sufficient evidence to go to the jury on number three.

Now I understand that I'm not going to have everybody agree with me, but that is what my understanding of my . . . [91] viewed in the light most favorable to the State. But applying that standard, I have reached the conclusion that the proof still falls short on number two, for example, as to both proof of ownership and belief that such statement was false, which is the second important prong of the offense of perjury. And I also find that with respect to number one, that based upon the evidence that we have and viewed most favorably to the State, you can't come out with any other conclusion but that this was not a statement of fact by someone who knew that that fact was not true but rather

a quibble with a description that — that had appeared on this order, and I — I guess I just have to stick with my original decision, Mr. Kilbreth, although I appreciate your drawing that to my attention.

(Mr. Stern entered chambers.)

THE COURT: Did you wish to discuss with me — I don't — I'm just seeking some guidance at this point as to how — how I approach the jury once I have made this decision. Mr. Kilbreth wants to rest before the jury, and you know the motion can be made, but it has been made out of the — we have discussed it out of the hearing on the jury, and any discussion of it would be out of the hearing of the jury as to judgment of acquittal. And I intend to — to grant it with respect to those two statements as I've already indicated. That gets us to the point of what . . . **[111]** time as to anything. You are not to speculate as to what has happened with respect to the statements that I just discussed with you. You are not to discuss the case among yourselves or with anyone else, and you are to keep yourself pure so to speak; that is, you are to refrain from reading or listening to any comment about this case from any source. I know that you take that obligation seriously. Those juries that I've had contact with have always done that. I guess until 9:00 tomorrow morning, I have nothing further to give you. I do apologize for any periods of time that you have been idle. Your presence was of course important at all times. Goodnight. We will see you tomorrow morning.

(Court was recessed at 2:50 p.m.)

* * * * *

CERTIFICATE

I hereby certify that the foregoing is an accurate transcript of my stenographic notes of the testimony and proceedings in the above-entitled cause.

Dated this 27th day of May, 1988.

/s/ _____

Maureen A. Bradford
Official Court Reporter

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. 85-128

STATE OF MAINE	)	INDICTMENT FOR
	)	VIOLATION OF 17-A
v.	)	M.R.S.A. § 451
	)	(PERJURY) CLASS C
FRED H. VAHLSING, JR.	)	

The Grand Jury charges:

On or about December 19, 1984, in the County of Kennebec, State of Maine, Fred H. Vahlsing, Jr., did, in an official proceeding, namely a hearing before the State of Maine Board of Environmental Protection on an administrative order (hereafter the "Order" — a copy of which is attached hereto and incorporated herein by reference), issued by Henry E. Warren, Commissioner of Environmental Protection, and dated August 27, 1984, make false statements under oath, namely:

(1) that there then was no building on land in Easton, Maine, the land and building being described in paragraph 2 of the Order as the site containing waste pesticides and other hazardous wastes;

(2) that the building identified in the Order as containing waste pesticides and other hazardous wastes was not owned by Vahlsing, Inc.; and

Exhibit B

(3) that the building identified in the Order as containing waste pesticides and other hazardous wastes had been sold by Vahlsing, Inc. to McCain Foods, Inc. in 1976,

the said Fred H. Vahlsing, Jr. not believing the statements to be true and the said statements being material because, if believed by the Board, the Board would have been likely to find that, contrary to the Commissioner's conclusion and finding on page 3 of the Order, Vahlsing, Inc. was not a responsible party within the meaning of 38 M.R.S.A. § 1362(2) and hence was not subject to enforcement orders or liable for costs incurred by the State in abating any environmental hazards posed by the site as described in the Order, all in violation of 17-A M.R.S.A. § 451(1)(A) (1983).

A True Bill

/s/ _____
Foreman

Dated: 3/5/85

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA. MAINE 04333

ADMINISTRATIVE ORDER
IN THE MATTER OF

F.H. VAHLSING, JR. PRESIDENT and VAHLSING, INC.	DESIGNATION OF UNCONTROLLED HAZARDOUS SUBSTANCE SITE & ADMINISTRATIVE ORDER
Proceeding Under 38 M.R.S.A. Section 1365, Uncontrolled Hazardous Substance Sites	

JURISDICTION

This Designation of Uncontrolled Hazardous Substance Sites and Administrative Order is issued pursuant to the authority vested in the Commissioner of EnvironmentaL Protection under the Uncontrolled Hazardous Substance Sites Law, 38, M.R.S.A., Sections 1361-1360.

Findings of Fact

1. F.H. Vahlsing, Jr. is President of Vahlsing, Inc. Vahlsing, Inc. is a corporation organized and existing under the laws of the State of Delaware. F.H. Vahlsing, Jr. and Vahlsing, Inc. are hereinafter referred to as "Vahlsing."

2. Vahlsing is the owner of one building, formerly a potato house, and was the owner of that building during which time that chemicals, including hazardous substances, were brought to and placed in the building. The building is located on land in Easton, Maine, owned by Bangor and

Aroostook Railroad. The land is described as being Lot 19 on Map 14 which is on file at the Assessor's Office in the Town of Easton.

Vahlsing has leased the land upon which the building is located from the Bangor and Aroostook Railroad since 1971. In March 1983, Vahlsing received notification from the Railroad that the property lease would be cancelled if the rent for the years 1978-1983 was not paid. The rent was paid in July 1983 although a new lease agreement which had been forwarded to Vahlsing was never fully executed. According to the Railroad, Vahlsing continues to lease the property.

The building and land are hereinafter referred to as "the site."

3. Over 2,500 gallons of chemicals, including hazardous substances are located at the site in containers of various sizes and condition.

4. Vahlsing is storing or has disposed of, among others, the following hazardous substances at the site:

   a. 2,4-dinitro-6-(1-methylpropyl)-phenol (dinoseb)

   b. arsenic

   c. corrosive liquid

5. These substances exhibit the following characteristics and threats to public health and safety in the event they are released into the environment:

a. 2,4-dinitro-6-(1-methylpropyl)-phenol (dinoseb)

Dinoseb is highly toxic by oral and dermal exposure. Human deaths have occurred from ingestion, with convulsions and vomiting seen. Long term exposures of some animals to non-fatal doses have caused cataracts and reduced growth. The acute oral LD_{50} (rat) is reported variously as 25-30 mg/kg.

This substance is classified as acutely toxic hazardous waste #P020 under the Department of Environmental Protection's Hazardous Waste Management Rules.

b. Arsenic Compound

The signs and symptoms of arsenic poisoning vary in degree and timing depending on the form and amount of arsenic and other factors. The major characteristics of acute arsenic poisoning are profound gastrointestinal damage and cardiac abnormalities. The signs include excruciating abdominal pain, forceful vomiting, cramps in the legs, restlessness and spasms. A feeble and irregular pulse and other symptoms of collapse, prostration, stupor, convulsions, paralysis, collapse and death in coma have been described. Environmental exposure to arsenicals has been correlated with a high skin cancer risk among populations exposed to sunlight, suggesting interference with repair of DNA damage.

This substance is classified as EP Toxic Hazardous Waste #D004 under the Department of Environmental Protection's Hazardous Waste Management Rules.

c. Corrosive Liquid

A solution of this strength of acidity is comparable to a 0.6% solution of hydrochloric acid (muriatic acid). It is corrosive, dangerous to eyes and irritating to less sensitive tissues.

This substance is classified as Hazardous Waste #D002 due to corrosivity under the Department of Environmental Protection's Hazardous Waste Management Rules.

6. The substances described in Paragraph 5 have been designated as hazardous wastes by the Board of Environmental Protection pursuant to 38 M.R.S.A., Section 1303-A. They are, accordingly, hazardous substances within the meaning of 38 M.R.S.A., Section 1361. These substances are being or have been stored or disposed of at the site in such a manner that they may be released or discharged into the soil, groundwater or ambient air.

7. Vahlsing has violated 38 M.R.S.A., Section 1306, and related Hazardous Waste Management Rules for operating a waste facility without a permit issued by the Board.

In addition, Vahlsing has violated Hazardous Waste Management Rules relating to Standards for the Generators of Hazardous Waste.

8. The structural integrity of the building is rapidly decreasing. A portion of the roof has collapsed and other roof-supporting structures have become distorted from the stress. Falling timbers have the potential of rupturing the containers and releasing the hazardous substances. A majority of the containers of hazardous substances are located within a flooded

area of the potato house. Contact with this water decreases the life expectancy of the containers. A release of hazardous substance from either a ruptured or rusted container will contaminate this water and any surface water or ground water that it comes in contact with.

9. On December 1, 1983, a Letter of Warning was mailed from this Departmen to F.H. Vahlsing, Jr. directing him to properly remove the chemicals from the site. No reply was received by this Department.

   On January 17, 1984, a second Letter of Warning was mailed to F.H. Vahlsing, Jr. and F.H. Vahlsing, Jr. signed for the certified letter.

   On July 5, 1984, the Department mailed, by certified mail, two letters to F.H. Vahlsing, Jr. at two different locations. The letters explained the Department's intention to declare the site uncontrolled if plans for the site clean-up were not received within 5 days of receipt of the notification. Both letters were returned unclaimed.

BASED upon the above Findings of Fact, the Commissioner concludes and finds that:

1. Vahlsing stores or has disposed of hazardous substances, as defined in 38 M.R.S.A., Section 1362, at the site;

2. Vahlsing and the Bangor and Aroostook Railroad are responsible parties as defined in 38 M.R.S.A., Section 1362;

3. Hazardous substances located at the site may create a danger to public health or safety of persons or to the environment;

4. Continued danger to public health or safety of any person or to the environment exists as a result of the lack of security at the site and the presence and condition of the hazardous substances on the site.

5. The actual or threatened releases of hazardous substances from the site pose a threat or hazard to the public health, safety or welfare and to the natural environment; and

6. Immediate action is necessary to abate the threat, danger or hazard to public health, safety and the environment.

THEREFORE, pursuant to 38 M.R.S.A., Section 1365, the Commissioner hereby DESIGNATES the Vahlsing site in Easton, Maine as an Uncontrolled Hazardous Substance Site.

ORDER

Vahlsing, is hereby ordered and directed to:

1. Within five (5) days:

   A. Prepare a plan to properly remove all hazardous wastes, contaminated soil and water from the site for transport to and disposal at a licensed hazardous waste facility, submit that plan to the DEP for its review and approval, and implement that plan as approved by the DEP within five (5) days of DEP approval.

2. Vahlsing shall comply immediately with this Order.

DONE AND DATED AT AUGUSTA, MAINE THIS 27TH DAY OF AUGUST, 1984.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: _____
Henry E. Warren, Commissioner

RIGHTS OF REVIEW AND APPEAL

Vahlsing may apply to the Board of Environmental Protection for a hearing on this Order. The hearing shall be held by the Board within 3 days after receipt of the application. Within 7 days after the hearing, the Board shall make findings of fact and continue, revoke or modify the Order. The decision by the Board may be appealed to Superior Court in accordance with the Maine Administrative Procedure Act, 5 M.R.S.A., Section 11001, *et seq.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached documentation was mailed via first class, United States mail, postage prepaid, on the 5th day of September, 1989 to the following:

James T. Kilbreth, Esquire
Chief Deputy Attorney General
State House Station #6
Augusta, Maine 04333

/s/ _____
F. H. Vahlsing, Jr.